(1)

No. 95-6465-CFY
Status: GRANTED

Title: Ray A. Lewis, Petitioner
v.
United States

Docketed:
October 20, 1995

Court: United States Court of Appeals for the Second Circuit

Counsel for petitioner: Statsinger,Steven M.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Oct 20 1995	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due December 20, 1995)
4	Nov 14 1995		Order extending time to file response to petition until December 20, 1995.
5	Dec 18 1995		Brief of respondent United States in opposition filed.
6	Dec 28 1995		DISTRIBUTED. January 12, 1996 (Page 11)
8	Jan 16 1996		REDISTRIBUTED. January 19, 1996 (Page 13)
10	Jan 19 1996		Petition GRANTED. In addition to the question presented by the petition, the parties are directed to brief and argue the following question: "Whether a defendant who would otherwise have a constitutional right to a jury trial may be denied that right because the presiding judge has made a pre-trial commitment that the aggregate sentence imposed will not exceed six months?" The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 1, 1996. The brief of the respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 29, 1996. A reply brief, if any, is to be filed pursuant to Rule 25.3. Rule 29.2 does not apply.
			**********
11	Feb 16 1996		SET FOR ARGUMENT TUESDAY, APRIL 23, 1996. (2ND CASE).
12	Feb 27 1996		Joint appendix filed.
13	Feb 27 1996		Brief of petitioner Ray A. Lewis filed.
15	Feb 29 1996		Brief amicus curiae of Jury Trial Group filed.
14	Mar 1 1996		Brief amici curiae of National Legal Aid and Defender Association, et al. filed.
16	Mar 12 1996		CIRCULATED.
17	Mar 20 1996		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Second Circuit.
18	Mar 29 1996	X	Brief of respondent United States filed.
19	Mar 29 1996		Record filed.
		*	Original record proceedings United States District Court for the Eastern District of New York.
20	Apr 15 1996	X	Reply brief of petitioner Ray A. Lewis filed.
21	Apr 23 1996		ARGUED.

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EDITOR'S NOTE

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No. 95-

Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

RAY A. LEWIS

Petitioner,

-v.-

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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No. 95-

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Petitioner,

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UNITED STATES OF AMERICA,

Respondent.

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THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

QUESTION PRESENTED

Whether the Court of Appeals erred in concluding that, although Mr. Lewis was charged with two offenses that exposed him to a total of 12 months' imprisonment, he was not entitled to a jury trial, a holding contrary to that of every one of the seven other federal courts that have considered this question.

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT.

Petitioner Ray A. Lewis respectfully requests that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit that affirmed the judgment of conviction of the United States District Court for the Eastern District of New York entered February 25, 1994, convicting petitioner of two counts of obstructing the mail, in violation of 18 U.S.C. § 1701, and sentencing him to three years' probation.

OPINION BELOW

The Court of Appeals rendered an opinion affirming petitioner's conviction, which is annexed as Appendix A. United States v. Lewis, ___F.3d___, Docket No. 94-1701 (2d Cir. September 5, 1995).

JURISDICTION

The judgment of the Court of Appeals was entered on September 5, 1995. A 1. No application has been filed for an extension of time within which to file this petition. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, amend. VI.

STATEMENT OF THE CASE

Introduction

Mr. Lewis, a postal worker, was charged with two counts of obstructing the mail, in violation of 18 U.S.C. § 1701. Since each count carried a maximum sentence of six months' imprisonment, Mr. Lewis faced a total possible punishment of 12 months in jail. He thus sought a jury trial, on the ground that the aggregate penalty exposure rendered the charges against him "serious." Every federal court to decide this issue had concluded that the aggregate penalty a defendant faces determines his jury trial right. Nevertheless, the magistrate judge denied the request for a jury. This ruling was affirmed by the United States District Court for the Eastern District of New York, and by the United States Court of Appeals for the Second Circuit.

The Jury Trial Ruling, Verdict and Sentence

After hearing extensive argument on whether Mr. Lewis was entitled to a jury trial, Magistrate Judge Joan Azrack stated that she was "not going to sentence Mr. Lewis to more than six months in prison under any circumstances," and granted the government's motion for a bench trial. After a one-day trial, she convicted Mr. Lewis of both counts of obstruction of the mail and sentenced him to three years' probation.

The District Court Appeal

Mr. Lewis appealed the denial of a jury trial to Judge Carol B. Amon of the United States District Court for the Eastern Dis-

trict of New York. The district court acknowledged that every federal court to consider the question had concluded that the aggregate penalty a defendant faces determines his jury trial right. Nevertheless, relying exclusively on the dissenting opinion in United States v. Coppins, 953 F.2d 86 (4th Cir. 1991), the district court concluded that those cases were incorrectly decided and that a defendant is entitled to a jury trial only if he faces a maximum sentence greater than six months for any single offense that is charged.

The Court of Appeals Decision

On September 5, 1995, the United States Court of Appeals for the Second Circuit affirmed. The court recognized that the question has not yet been resolved by this Court. It also acknowledged the unanimity of the numerous federal court decisions concluding that the aggregate penalty a defendant faced determined whether he is entitled to a jury trial. Slip op. at 6797. Nevertheless, the court rejected the reasoning of the other federal courts. It held that, since under 18 U.S.C. § 3584(a) multiple terms of imprisonment imposed simultaneously are presumptively concurrent, "multiple offenses prosecuted jointly are no more serious in their aggregate than the most serious single offense of conviction." Slip op. at 6798. The court also held that Mr. Lewis was not entitled to a jury trial since "the question of [his] right to a jury trial could have been obviated altogether" had the government chosen to sever the two counts

and prosecute them separately. Slip op. at 6798-99.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS' DECISION THAT MR. LEWIS WAS NOT ENTITLED TO A JURY TRIAL IS IN CONFLICT WITH THIS COURT'S WELL ESTABLISHED JURY TRIAL JURISPRUDENCE, AS WELL AS WITH THE HOLDINGS OF THREE OTHER CIRCUITS AND FOUR DISTRICT COURTS.

This Court's Sixth Amendment jurisprudence has created a "bright-line" rule that a criminal defendant who faces more than 6 months' imprisonment in a single proceeding is entitled to a jury trial. Codispoti v. Pennsylvania, 418 U.S. 506 (1974); Baldwin v. New York, 399 U.S. 66 (1970). Although the Court has not specifically ruled on the question whether a defendant who is tried on multiple petty offenses in a single prosecution is entitled to a jury trial if his aggregate penalty exposure exceeds 6 months' imprisonment, every federal court to consider the question has concluded that such a defendant is entitled to a jury trial. The Second Circuit's contrary ruling has created a split among the circuits on this important constitutional question, and threatens to erode the "bright-line" rule established by this Court's precedents. Certiorari should accordingly be granted.

A. There Is a Split Among the Circuits on the Question Whether a Defendant Charged with Multiple Petty Offenses, but Facing More than a Six Month's Imprisonment if Convicted, Is Entitled to a Jury Trial.

The Sixth Amendment jury trial right extends only to defendants charged with "serious" crimes; those facing "petty" charges

may be tried without a jury. Duncan v. Louisiana, 391 U.S. 145, 159 (1968). In Baldwin, 399 U.S. at 68-69, this Court defined "serious" offenses as those for which the authorized statutory penalty is more than six months' imprisonment. Although Duncan, Baldwin and their progeny have left open the question presented by this case -- whether a defendant charged with multiple "petty" crimes, but facing "serious" criminal sanctions, is constitutionally entitled to a jury trial -- a consistent application of the principles established in those cases, particularly Codispoti, 418 U.S. at 506, leads to the conclusion that such a defendant must be tried by jury.

With the exception of the Second Circuit, every federal court in which the issue has been litigated has concluded that a defendant facing an aggregate total of more than 6 months' imprisonment is entitled to a jury trial. See United States v. Coppins, 953 F.2d 86, 90 (4th Cir. 1991); United States v. Bencheck, 926 F.2d 1512 (10th Cir. 1991); Rife v. Godbehere, 814 F.2d 563 (9th Cir. 1987); United States v. Musgrave, 695 F.Supp 231, 233 (W.D.Va 1988); United States v. O'Connor, 660 F.Supp 955 (N.D.Ga 1988); United States v. Coleman, 664 F.Supp 548 (D.D.C. 1985); United States v. FMC Corp. 428 F.Supp 615 (W.D.N.Y. 1977), aff'd on other grounds, 572 F.2d 902 (2d Cir. 1978). Moreover, since 1974, when Codispoti was decided, every state court to consider the question has also concluded that the aggregate penalty a defendant faces triggers the Sixth Amendment right to a

jury trial.[1] See State v. Bell, 899 P.2d 1000 (Kan. 1995)(aggregation required in some circumstances); State v. Jones, 396 So.2d 1272, 1274 (La. 1981); State v. Hamm, 577 A.2d 1259, 1261 (N.J. 1990), cert. denied, 499 U.S. 947 (1991); State v. Sanchez, 786 P.2d 42 (N.M. 1990)[2].

The Second Circuit has rejected this unanimous body of precedent, concluding that the "mere possibility of consecutive sentences exceeding six months' imprisonment is insufficient to trigger a defendant's right to a jury trial." Slip op. at 6798. The Second Circuit has thus created a split among the circuits on this important constitutional question; certiorari should be granted to resolve this conflict.

B. The Second Circuit Incorrectly Applied Baldwin and Codispoti in this Case.

Certiorari should also be granted because the Second Circuit's resolution of this issue is incorrect. Only aggregating the potential penalties a defendant faces is consistent with Baldwin's mandate that a jury trial is required "when what is at

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[1] In some states the question is not relevant, since either the state constitution or a statute provides the defendant with a more expansive jury trial right than that guaranteed by the Sixth Amendment.

[2] In New York, there is no appellate authority on the question. The most recent lower court decision held that aggregating the total penalties the defendant faces is required. See, e.g., People v. Estevez, 622 N.Y.S.2d 870 (Crim. Ct. Kings Co. 1995).

stake is the deprivation of individual liberty for a period exceeding six months." 399 U.S. at 72. Since Baldwin sets the line between serious and petty prosecutions "on the basis of the possible penalty alone" (Id. at 72-73, emphasis added), the Second Circuit was incorrect in holding that the possible 12-month penalty Mr. Lewis faced did not trigger a jury trial.

Codispoti, 418 U.S. at 516-517, strongly suggests that the jury trial right is based on the aggregate penalty a defendant faces at a single trial, and not, as the Second Circuit believes, on the authorized maximum sentence of the most serious single count. In Codispoti, two contemnors were convicted of several petty contempts in a single, non-jury proceeding, but were sentenced to consecutive terms of imprisonment well in excess of six months. This Court reversed their convictions, holding that "each contemnor was tried for what was equivalent to a serious offense and was entitled to a jury trial." The Second Circuit refused to apply the reasoning of Codispoti to non-contempt cases, although it recognized that the Fourth Circuit has. Slip op. at 6800; see Coppins, 953 F.2d at 90.

> Because courts cannot look to Congress's estimation of seriousness in the contempt context, the fact that the Supreme Court mandated aggregation of multiple contempt penalties to determine the sentence actually imposed has no bearing on the issue at hand. While Codispoti controls in those circumstances in which no maximum penalty is provided by law, it does not affect the analysis when Congress has provided a specific measure of the seriousness of a particular crime.

Slip op. at 6800. The distinction drawn by the Second Circuit between contempt offenses and non-contempt offenses is untenable. For Sixth Amendment purposes, the difference in the manner by which the maximum authorized penalty is determined does not change the consequence of a maximum authorized penalty of more than six months' imprisonment. "[I]n terms of those considerations which make the right to jury trial fundamental in criminal cases, there is no substantial difference between serious contempts and other serious crimes." Codispoti, 418 U.S. at 516, citations and internal quotation marks omitted. See also, Blanton v. City of North Las Vegas, 489 U.S. 538, 543 n.7 (1989)(non-contempt case relying, in part, on Codispoti).

Nor is the Second Circuit's alternative reasoning persuasive. The court first incorrectly concluded that 18 U.S.C. § 3584(a) evinces Congress's judgment that the commission of two separate offenses is not more serious than the commission of a single offense, because under this statute multiple sentences imposed at the same time are presumptively concurrent. To the contrary, that Congress considers the commission of several crimes to be more serious than the commission of a single crime is demonstrated by the fact that consecutive sentences are authorized by § 3584(a). Only if § 3584(a) forbade consecutive sentences would the Second Circuit's reading of the statute be justified.

The court also held that since the government could have

avoided a jury trial by severing the counts, there was no right to a jury trial in a prosecution where the counts were joined. Slip op. at 6798-99. But whether the government can circumvent the jury trial right is irrelevant to whether that right actually exists. If the Second Circuit's analysis is correct, then it is also true that the defendant can be denied a jury trial in any case, even one involving serious felony charges; all the government need do is assert that it could have reduced the charges to petty misdemeanors, for which a jury trial would not be required, but elected not to.

C. There Is also A Circuit Split on the Question Whether a Trial Court's Pre-Trial Sentence Promise Can Deprive the Defendant of a Jury Trial.

Before trial, the magistrate promised that she would not sentence Mr. Lewis to more than six months' imprisonment. The Second Circuit, in dicta, concluded that such a pre-trial promise could not serve as the basis for denying a jury trial. "[S]elf-imposed limitations on sentencing by the court cannot deprive a defendant of his constitutionally protected right to a jury trial." Slip op. at 6800-01. However, the Tenth Circuit has reached the opposite conclusion. Bencheck, 926 F.2d at 1519. Granting certiorari would allow the Court to resolve this circuit split as well.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
October 19, 1995

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1698—August Term, 1994
(Argued: June 20, 1995 Decided: September 5, 1995)
Docket No. 94-1701

UNITED STATES OF AMERICA,

Appellee.

—v.—

RAY A. LEWIS,

Defendant-Appellant.

Before:

KEARSE, ALTIMARI and PARKER,
Circuit Judges.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Amon, *J.*), convicting defendant-appellant Ray Lewis, following a

bench trial, of two counts of obstructing the mails, in violation of 18 U.S.C. § 1701.

Affirmed.

STEVEN M. STATSINGER, The Legal Aid Society Federal Defender Division Appeals Bureau, New York, New York, *for defendant-appellant*.

JAMES WALDEN, Assistant United States Attorney, Eastern District of New York, Brooklyn, New York (Zachary W. Carter, United States Attorney, Susan Corkery, Assistant United States Attorney, on the brief), *for appellee*.

ALTIMARI, *Circuit Judge*:

Defendant-appellant Ray Lewis ("Lewis") appeals from a judgment of the United States District Court for the Eastern District of New York (Amon, *J.*), convicting him, following a bench trial, of two counts of obstructing the mails. Lewis contends that he was improperly denied a jury trial in light of the fact that the maximum potential aggregate sentence for his two charges exceeded six months. The district court, however, held that, for the purpose of determining a defendant's right to a jury trial, penalties should not be aggregated. Because Congress has given no indication that multiple offenses are more serious by virtue of their multiplicity than are single offenses of the same nature, the right to

a jury trial cannot depend upon the maximum potential aggregate term of incarceration. Accordingly, we affirm the judgment of the district court.

BACKGROUND

Lewis, a postal worker, was charged with two counts of obstructing the mail in violation of 18 U.S.C. § 1701. The maximum sentence for each count was six months' imprisonment, a hundred dollar fine and a ten dollar special assessment. Prior to trial, the government moved to have Lewis tried without a jury. Magistrate Judge Azrack granted the government's motion, but stated that she would not "sentence Mr. Lewis to more than six months in prison under any circumstances . . . ." On February 25, 1994, Lewis was convicted of both counts and sentenced to three years of probation on each count to run concurrently.

Lewis appealed the denial of a jury trial to the district court, which on December 7, 1994 affirmed Magistrate Judge Azrack's determination. The district court held that the right to a jury trial was not determined by the severity of the sentences for the offenses in their aggregate, but rather by the severity of the sentences for each charge individually. Thus, according to the district court, "a defendant is entitled to a jury trial only if he faces a maximum sentence greater than six months for any single offense that is charged."

Lewis now appeals the determination of the district court.

DISCUSSION

The United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ." U.S. Const. amend. VI. Despite the absolute language of the Sixth Amendment, the Supreme Court has made clear that a jury trial is required for only those offenses that are "serious" in nature; bench trials are sufficient for "petty" offenses. *See Duncan v. Louisiana*, 391 U.S. 145, 159-62 (1968).

In order to determine whether or not an offense is "serious," the Supreme Court has looked to "objective criteria." *Baldwin v. New York*, 399 U.S. 66, 68 (1970) (plurality opinion). According to the Court, the best objective indicator of the seriousness of an offense is "the severity of the maximum authorized penalty." *Id.* Implicit in the maximum penalty is Congress's view as to the seriousness of that crime. *See Blanton v. North Las Vegas*, 489 U.S. 538, 541 (1989); *Frank v. United States*, 395 U.S. 147, 148 (1969). The legislature is better equipped than is the judiciary to measure public sentiment as to the seriousness of respective offenses and is more responsive to changes in the public attitude. *See Blanton*, 489 U.S. at 541-42; *see also Landry v. Hoepfner*, 840 F.2d 1201, 1209 (5th Cir. 1988) (en banc), *cert. denied*, 489 U.S. 1083 (1989). Thus, the maximum authorized penalty for a particular offense is a strong indicator of the present sentiment as to the seriousness of that crime.

While courts are instructed to look at all potential modes of punishment for a particular offense (e.g. incarceration, probation, fines, etc.), "[p]rimary emphasis . . . must be placed on the maximum authorized period

of incarceration." *Blanton*, 489 U.S. at 542. Regardless of any other possible punishment, the Supreme Court has determined that "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized." *Baldwin*, 399 U.S. at 69. Accordingly, any defendant facing in excess of six months incarceration for a single offense is entitled to a jury trial.

The question which remains unanswered by the Supreme Court, however, is whether an individual potentially facing over six months imprisonment for multiple petty offenses is entitled to a jury trial. Those courts which have addressed this question to date are in agreement that potential sentences must be aggregated to determine the right to a jury trial. *See United States v. Coppins*, 953 F.2d 86, 90 (4th Cir. 1991); *United States v. Bencheck*, 926 F.2d 1512, 1518 (10th Cir. 1991); *Rife v. Godbehere*, 814 F.2d 563, 565 (9th Cir. 1987); *see also United States v. Musgrave*, 695 F. Supp. 231, 233 (W.D.Va. 1988); *United States v. O'Connor*, 660 F. Supp. 955, 956 (N.D.Ga. 1987); *United States v. Coleman*, 664 F. Supp. 548, 549 (D.D.C. 1985); *United States v. FMC Corp.*, 428 F. Supp. 615, 620 (W.D.N.Y. 1977), *aff'd on other grounds*, 572 F.2d 902 (2d Cir. 1978). These courts reason, in essence, that "defendants can view as no less serious a possible penalty of [over six months] in prison when charged with [multiple] offenses . . . than if charged with one offense having a potential penalty of [greater than six months]. . . . Nor . . . should [a] court view the offenses any less seriously." *Coppins*, 953 F.2d at 90 (quoting *United States v. Potvin*, 481 F.2d 380, 382 (10th Cir. 1973)).

We reject the reasoning of these courts. When determining a defendant's rights under the Sixth Amendment,

the mere possibility of consecutive sentences exceeding six months' imprisonment is insufficient to trigger a defendant's right to a jury trial. We believe that in reaching the opposite conclusion, the courts discussed above failed to focus on the appropriate objective criteria for determining the seriousness of multiple offenses tried together. The Supreme Court has made clear that courts should look to Congress's determination as to the seriousness of a particular offense. Indeed, the Court has explicitly stated that "[t]he judiciary should not substitute its judgment as to seriousness for that of [the] legislature . . . ." *Blanton*, 489 U.S. at 541. While those courts that have previously addressed the question have focused upon the *defendant's* view as to the seriousness of facing over six months imprisonment for aggregate sentences, the appropriate inquiry is how seriously *Congress* views the offenses in the aggregate.

Congress has not indicated that multiple offenses for which a defendant is prosecuted jointly are necessarily any more serious in their aggregate than the most serious individual offense. Rather, 18 U.S.C. § 3584(a) provides that, except as mandated by court order or statute, "[m]ultiple terms of imprisonment imposed at the same time run concurrently." Thus, the presumption under § 3584(a) is that multiple offenses prosecuted jointly are no more serious in their aggregate than the most serious single offense of conviction.

Moreover, the question of Lewis's right to a jury trial could have been obviated altogether had the government chosen to simply charge both counts of obstructing the mail in separate informations. While trying Lewis's two offenses separately would have been contrary to judicial economy—an outcome we seek to avoid when possible—Lewis himself admits that under such a circumstance he would not have been entitled to a jury trial. Under § 3584, had Lewis been convicted in separate bench trials, the district court could have sentenced him to two terms of imprisonment to run consecutively, thus still exposing him to as much as a year of imprisonment. The mere fact that the government chose to consolidate the charges provides no greater justification for a jury trial than if the charges were tried separately. As Judge Niemeyer wrote in his dissenting opinion in *Coppins*, "[j]udicial efficiency imposed at no greater risk to the defendant should not change the standard for determining whether the defendant is given a jury trial." *Coppins*, 953 F.2d at 92 (Niemeyer, *J.*, dissenting). We agree.

In addressing the question of aggregate penalties, the Fourth Circuit has held that the Supreme Court's pronouncement in *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974), is determinative of the issue:

> [T]here is no apparent reason why the Court's holding in *Codispoti v. Pennsylvania* that consecutive sentences of imprisonment actually imposed for a series of contempts committed during a single trial should be aggregated for this purpose should not apply also to require aggregation of any maximum sentences authorized by statute where those are determinative of the right.

Coppins, 953 F.2d at 90 (citation omitted). In *Codispoti*, however, the Supreme Court addressed the question of aggregating penalties in the context of contempt charges, which in our view does not bear directly upon the issue at hand.

"In criminal contempt prosecutions, 'where no maximum penalty is authorized, the severity of the penalty actually imposed is the best indication of the seriousness

of the particular offense.' " *Blanton*, 489 U.S. at 542 n.6 (quoting *Frank*, 395 U.S. at 149). Accordingly, the only measure of the seriousness of a particular contemnor's criminal acts is the entirety of the court's sentence—the aggregate of the penalties imposed for each contemptuous act—a matter which is strictly at the court's discretion, *see, e.g., United States v. Local 1804-1, Int'l Longshoremen's Assoc., AFL-CIO*, 44 F.3d 1091, 1095-96 (2d Cir. 1995) (describing limits of court's discretion). Because courts cannot look to Congress's estimation of seriousness in the contempt context, the fact that the Supreme Court mandated aggregation of multiple contempt penalties to determine the sentence actually imposed has no bearing on the issue at hand. While *Codispoti* controls in those circumstances in which no maximum penalty is provided by law, it does not affect the analysis when Congress has provided a specific measure of the seriousness of a particular crime—then, as now, aggregation of penalties remains an inappropriate basis upon which to determine a defendant's right to a jury trial.

Finally, the government argues that even if the court were to aggregate potential sentences, Lewis was not entitled to a jury trial because the magistrate judge assured Lewis that the trial would result in no greater sentence than six months' imprisonment. While we need not resolve this question, in light of the discussion above it is clear that the government's argument is unavailing. The measure for constitutionally required jury trials is the "seriousness" of any given offense or offenses, which is, in turn, measured principally by the maximum punishment authorized by Congress; therefore, self-imposed limitations on sentencing by the court cannot deprive a defendant of his constitutionally protected right to a jury

trial. *But see Bencheck*, 926 F.2d at 1519 ("where the trial judge announced that the sentence, in the event of conviction, would be no more than six months' incarceration . . . no jury was constitutionally required").

CONCLUSION

Because we do not believe that Congress has indicated that petty offenses are more serious in their aggregate than is each petty offense unto itself, we affirm the judgment of the district court.

Supreme Court, U.S.
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No. 95-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

RAY A. LEWIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPLICATION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT.

Petitioner, Ray A. Lewis, respectfully requests leave to proceed here in forma pauperis, without payment of fees and costs. Counsel certifies that, in the court below, counsel was appointed to represent petitioner, pursuant to the Criminal Justice Act.

Dated: New York, New York
October 19, 1995

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Attorney-in-Charge Appeals Bureau
Henriette D. Hoffman

October 19, 1995

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

Honorable William W. Suter
Clerk
Supreme Court of the United States
1 First Street, N.E.
Supreme Court Building
Washington, D.C. 20543

Re: RAY A. LEWIS v. UNITED STATES OF AMERICA
95-

Dear Mr. Suter:

Enclosed are ten copies each of a petition for a writ of certiorari and an attached appendix on behalf of Ray A. Lewis, an application for leave to proceed in forma pauperis, a certificate of service, and a statement of filing by mail.

Three copies of the petition and appendix and one of the application for in forma pauperis relief have been served by first-class mail on the Office of the Solicitor General of the United States and one copy of each has been served on the United States Attorney, Eastern District of New York, Attention: James Walden, Assistant United States Attorney.

Very truly yours,

STEVEN M. STATSINGER
Associate Appellate Counsel

SMS/wd

Enclosures

cc: Honorable Drew S. Days, III
Solicitor General of the
United States

James Walden, Esq.
Assistant United States Attorney
Eastern District of New York

EDITOR'S NOTE

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Supreme Court, U.S.
FILED
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No. 95-6465

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

RAY A. LEWIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

RECEIVED
AFTER HOURS
DEC 18 1995
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SUPREME COURT, U.S.

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

DANIEL S. GOODMAN
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether a defendant charged with two petty offenses, who was assured by the trial judge that his sentence (even if convicted of both offenses) would not exceed six months' imprisonment, had a constitutional right to a jury trial.

IN THE SUPREME COURT OF THE UNITED STATES

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v.

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ON PETITION FOR A WRIT OF CERTIORARI
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 6793-6801) is reported at 65 F.3d 252. The opinion of the district court (App., infra, 1-13)[1] is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 5, 1995. The petition for a writ of certiorari was filed on October 20, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] The opinion of the district court was not included in petitioner's appendix, and it is therefore attached as an appendix to this brief.

STATEMENT

Following a bench trial in the United States District Court for the Eastern District of New York, petitioner was convicted on two counts of obstructing the mail, in violation of 18 U.S.C. 1701. He was sentenced to three years' probation, ordered to participate in a drug treatment program, and assessed $10. The court of appeals affirmed.

1. On two consecutive days, petitioner, a postal worker, was observed ripping open several pieces of mail and pocketing the contents, including marked currency. Gov't C.A. Br. 3. He was charged with two counts of obstructing the mail. Pet. App. 6795. The maximum authorized term of imprisonment for each count was six months' imprisonment. 18 U.S.C. 1701.

2. The magistrate judge granted the government's motion for a non-jury trial. Gov't C.A. Br. 3. She reasoned that since she would not "under any circumstances" sentence petitioner to more than six months' imprisonment, petitioner was not entitled to a jury. Ibid.

The district court affirmed petitioner's conviction. App., infra, 1-13. It rejected petitioner's argument that "the possibility of receiving a [cumulative] sentence in excess of six months, in effect, transformed the two petty offenses into a serious offense, guaranteeing him the constitutional right to a jury trial." Id. at 3. In the court's view, the right to a jury trial on a criminal charge is determined by the severity of the sentence for that charge, not by the seriousness of the defendant's

overall conduct, as measured by the potential aggregate penalty on all of the offenses charged. Id. at 4-5.[2]

3. The court of appeals affirmed. The court noted that other federal courts have held that "potential sentences must be aggregated to determine the right to a jury trial," but it "reject[ed] the reasoning of these courts." Pet. App. 6797. It explained that the appropriate focus is not on "the defendant's view as to the seriousness of facing over six months imprisonment for aggregate sentences," but rather on "how seriously Congress views the offenses in the aggregate." Id. at 6798. The court observed that, under 18 U.S.C. 3584(a), absent a contrary court order or statute, "multiple terms of imprisonment imposed at the same time run concurrently," which indicates a congressional presumption "that multiple offenses prosecuted jointly are no more serious in their aggregate than the most serious single offense of conviction." Pet. App. 6798. Moreover, the court saw little merit in viewing petitioner's jointly tried petty offenses in the aggregate, when petitioner's claimed "right to a jury trial could have been obviated altogether had the government chosen to simply charge both counts * * * in separate informations." Ibid.

The court of appeals distinguished Codispoti v. Pennsylvania, 418 U.S. 506 (1974), in which this Court affirmed the right to a

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[2] The district court also rejected petitioner's claim that the magistrate judge's authority, under 18 U.S.C. 3563(b)(6), to order petitioner to give up his job as a postal worker as a condition of probation was an "additional statutory penalty" that rendered his offenses serious and entitled him to a jury trial. App., infra, 10-12. Petitioner did not pursue that argument in the court of appeals.

jury in criminal contempt proceedings that had resulted in multiple consecutive six month sentences. The court of appeals explained that, in Codispoti, the aggregate penalty actually imposed was the only available objective measure of the seriousness of the offense, because Congress has not specified a maximum penalty for the offense of criminal contempt. Pet. App. 6799-6800.

After it concluded that petitioner had no right to a jury trial on his two petty offenses, the court noted the government's suggestion that, even if aggregation of the potential sentences for two offenses had been appropriate, petitioner would still have had no entitlement to a jury, since the magistrate judge had promised petitioner before the trial that he would receive a sentence of no more than six months' imprisonment. Pet. App. 6800. While observing that it "need not resolve this question," the court stated that the government's suggestion lacked merit. Noting that the seriousness of an offense is "measured principally by the maximum punishment authorized by Congress," the court reasoned that a trial judge's "self-imposed limitations on sentencing * * * cannot deprive a defendant of his constitutionally protected right to a jury trial." Id. at 6800-6801.

ARGUMENT

Petitioner correctly observes (Pet. 4-6) that the holding in this case conflicts with the decisions of other courts of appeals, which have viewed the penalties for jointly tried petty offenses in the aggregate for purposes of determining the defendant's right to a jury trial. This case is not an appropriate vehicle for

resolution of that conflict, however, because on the facts of this case it is unclear that petitioner would have been entitled to a jury trial under the law of any Circuit.

1.a. This Court has long held that "there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision." Duncan v. Louisiana, 391 U.S. 145, 159 (1968). In deciding whether a particular offense is petty, the Court has looked to "objective indications of the seriousness with which society regards the offense," Frank v. United States, 395 U.S. 147, 148 (1969), primarily "the severity of the maximum authorized penalty." Baldwin v. New York, 399 U.S. 66, 68 (1970) (plurality opinion). The Court concluded in Baldwin that "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized." 399 U.S. at 69. In Blanton v. City of North Las Vegas, 489 U.S. 538, 543 (1989), the Court established the converse presumption that "an offense carrying a maximum prison term of six months or less" is "petty" for Sixth Amendment analysis. Ibid.

The Court's focus on "objective indications" suggests that the jury trial right turns on an independent analysis of the seriousness of each charged offense, rather than the aggregate penalty that might be imposed in a single trial. When a defendant is charged with several petty offenses, there is no constitutional or statutory requirement that those offenses be charged in a single information or tried jointly. Petitioner conceded below (Pet. App. 6798-6799) that if the two offenses of which he was convicted had

been prosecuted in separate trials, he would not have been entitled to a jury in either trial, even though the district court would similarly have had the authority to sentence him to two consecutive six-month terms of imprisonment. "The administrative convenience of trying separate offenses on the same day or even on a single charging document does not change the seriousness of the offenses or the risk to the defendant." United States v. Coppins, 953 F.2d 86, 92 (4th Cir. 1991) (Niemeyer, J., dissenting). As Judge Niemeyer further explained,

> [t]he fact remains that the defendant is charged with separate, petty offenses, each constituting a crime for which the defendant would not be entitled to a jury trial. The meaningful constitutional object of inquiry is the offense with which the defendant is charged, not the accumulation of offenses tried on a given day or on a given charging document. Judicial efficiency imposed at no greater risk to the defendant should not change the standard for determining whether the defendant is given a jury trial.

Ibid.

b. Contrary to petitioner's argument (Pet. 7), the court of appeals' focus on the maximum authorized penalty for each individual offense does not conflict with this Court's decision in Baldwin. That case involved a single charge of "jostling" under New York law, Baldwin, 399 U.S. at 67, and the Court had no occasion to address the standards applicable to jointly tried petty offenses.

Nor does the decision below conflict with Codispoti. See Pet. 8-9. In that case, this Court looked to the aggregate penalty actually imposed by the trial court for several criminal contempts in determining whether the offenses charged were serious enough to

entitle the defendant to a jury trial. As the court below recognized, in the criminal contempt context, "no maximum penalty is provided by law," and "the only measure of the seriousness of a particular contemnor's criminal acts is the entirety of the court's sentence -- the aggregate of the penalties imposed for each contemptuous act -- a matter which is strictly at the court's discretion." Ibid. See also Blanton, 489 U.S. at 542 n.6. Where, as here, "Congress has provided a specific measure of the seriousness" of the crime by establishing a maximum penalty, Pet. App. 6800, "[t]he judiciary should not substitute its judgment as to seriousness." Blanton, 489 U.S. at 541.

Criminal contempts also pose unique issues that may militate in favor of access to jury trials. The trial court determines how many contempts will be prosecuted, sets the penalty for each individual act of contempt, and decides whether the penalties will run consecutively. Accordingly, determining the right to a jury trial on the basis of the aggregate penalty imposed serves as a safeguard against vindictive or capricious judicial action. As this Court explained in Codispoti,

> [i]t is normally the trial judge who, in retrospect, determines which and how many acts of contempt the citation will cover. It is also he or, as in the case here, another judge who will impose the sentences and who will determine whether they will run consecutively or concurrently. In the context of post-verdict adjudication of various acts of contempt, it appears to us that there is posed the very likelihood of arbitrary action that the requirement of jury trial was intended to avoid or alleviate.

418 U.S. at 515. There is no similar need for a safeguard where the maximum authorized penalties have been established by the legislature.

2. As petitioner notes (Pet. 5), the other courts of appeals that have addressed the issue have (contrary to the court below) looked to the aggregate incarceration periods for jointly tried petty offenses. See Coppins, 953 F.2d at 90 (right to jury trial depends on maximum potential aggregate sentence); United States v. Bencheck, 926 F.2d 1512, 1518 (10th Cir. 1991) (same) (citing Harr v. Hanrahan, 708 F.2d 1547, 1553) (10th Cir. 1983)); Rife v. Godbehere, 814 F.2d 563, 564 (9th Cir.) (right to jury trial depends on length of term of incarceration actually imposed), amended, 825 F.2d 185 (9th Cir. 1987). This case is not an appropriate vehicle for review of that conflict, however, because, under the facts of this case, it is unclear that petitioner would have had a right to a jury trial under the extant law of any Circuit.

In Bencheck, even though the cumulative authorized maximum penalty exceeded six months' imprisonment, the Tenth Circuit held that no jury trial was required, because the district court had promised the defendant pre-trial that it would not sentence him to more than six months' imprisonment if he were found guilty. Bencheck, 926 F.2d at 1513. Since the magistrate judge in this case similarly promised petitioner that she would not "under any circumstances" impose an aggregate sentence exceeding six months'

imprisonment, petitioner would have had no entitlement to a jury under settled Tenth Circuit law.

Petitioner would have had no greater recourse to a jury in the Ninth Circuit. In Rife, the court of appeals explained that "[w]here the judge has discretion to impose [imprisonment of] more than six months by imposing consecutive sentences, * * * it is the judge's [actual] exercise of his discretion, not the mere fact that he has discretion, that determines whether the offense is 'petty.'" Rife, 814 F.2d at 564-565 (brackets in original) (quoting Maita v. Whitmore, 508 F.2d 143, 146 (9th Cir. 1974), cert. denied, 421 U.S. 947 (1975)). Although the court found that the defendant had initially been denied his constitutional right to a jury trial, it held that the violation had been "remedied" by the trial court's [later] reduction of the sentence to six months' imprisonment." Id. at 565. In this case, the Ninth Circuit would presumably have found no violation (or would have found any such violation "remedied") because petitioner was actually sentenced only to three years' probation.

Finally, while the Fourth Circuit held in Coppins that "the maximum sentences of imprisonment authorized for those petty offenses with which [the defendant] was charged should have been aggregated for purposes of determining her right to [a] jury trial," Coppins, 953 F.2d at 90, it "expressed no opinion" as to whether "a court may, by pretrial formal commitment not to impose a sentence of imprisonment in excess of six months, remove any right to jury trial that otherwise would obtain," id. at 90 n.2.

Since the Fourth Circuit has not yet addressed the effect of a judicially imposed pre-trial sentence limitation, it is unclear whether that Circuit would find a right to a jury trial in this case.

Petitioner argues (Pet. 9) that the court of appeals' statement that "self-imposed limitations on sentencing by the court cannot deprive the defendant of his constitutionally protected right to a jury trial" (Pet. App. 6800-6801) conflicts with the Tenth Circuit's resolution of that issue in Bencheck. Petitioner is not the appropriate party to raise that objection, since the court of appeals sided with petitioner on the issue. Moreover, since the court had already determined that petitioner had no right to a jury trial, its remarks regarding the significance of pre-trial sentencing stipulations were mere dicta, as petitioner concedes (Pet. 9). Those remarks provide no basis for further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

DANIEL S. GOODMAN
Attorney

DECEMBER 1995

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Appellee,

DECISION
93-CR-1342 (CBA)

-against-

RAY A. LEWIS,

Defendant-Appellant.

----------x

AMON, U.S. DISTRICT JUDGE

INTRODUCTION

Appellant, Ray Lewis, was convicted on February 25, 1994, after a bench trial before Magistrate Judge Azrack, on two counts of obstructing the mail in violation of 18 U.S.C. § 1701. The appellant challenges his conviction claiming that he was charged with a "serious" offense and was thus constitutionally entitled to a jury trial. For the reasons set forth below, the Court finds that appellant was not entitled to a jury trial and his conviction is hereby affirmed.

BACKGROUND

Appellant was charged in a two-count information with knowingly obstructing the passage of mail in violation of 18 U.S.C. § 1701 on June 3, 1992 and on June 4, 1992. Each count carried a maximum sentence of six months' imprisonment, a fine of one hundred dollars and a ten dollar special assessment.

Over appellant's objection, the government moved that the appellant be tried non-jury. Upon granting the government's motion

for a non-jury trial, the Magistrate Judge stated affirmatively that if defendant was convicted on both counts, under no circumstances would she impose a term of imprisonment greater than six months pursuant to 18 U.S.C. § 3584.[1]

Defendant was subsequently convicted of both counts and was sentenced to three years probation on each count, with the sentences to run concurrently. Defendant appeals his conviction claiming that it was error to deny him the constitutional right to a jury trial.

DISCUSSION

In Baldwin v. New York, the Supreme Court reaffirmed the long-standing principle that the Sixth Amendment mandates that a defendant charged with a "serious" offense is entitled to a trial by jury, while a defendant charged with a "petty" offense may be tried without a jury. Baldwin v. New York, 399 U.S. 66, 68 (1970) (plurality opinion) (citing Duncan v. Louisiana, 391 U.S. 145 (1968)). "In deciding whether an offense is 'petty,' we have sought objective criteria reflecting the seriousness with which society regards the offense ... and we have found the most relevant such criteria in the severity of the maximum authorized penalty." Id. at 68 (citations omitted). The Court held that a potential

[1]18 U.S.C. § 3584 provides in relevant part that "[i]f multiple terms of imprisonment are imposed on a defendant at the same time ... the terms may run concurrently or consecutively ... Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively."

sentence in excess of six months imprisonment is sufficiently severe by itself to render an offense "serious". Id. at 69.

In Blanton v. City of North Las Vegas, Nev., 489 U.S. 538 (1989), the Supreme Court revisited the issue of distinguishing a serious offense from a petty offense for the purpose of determining a defendant's right to a jury trial . After declining to hold that an offense carrying a maximum prison term of six months or less is automatically a "petty" offense, the Court held that such offenses are presumed to be petty for purposes of the Sixth Amendment's right to a jury trial. The Court explained:

> A defendant is entitled to a jury trial in such circumstances only if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one. This standard, albeit somewhat imprecise, should ensure the availability of a jury trial in the rare situation where a legislature packs an offense it deems 'serious' with onerous penalties that nonetheless do not puncture the 6-month incarceration line.

Id. at 543.

The parties do not dispute that the conduct proscribed by 18 U.S.C. § 1701 is a "petty" offense; however, appellant claims that he was entitled to a jury trial because he faced an aggregate possible sentence of 12 months imprisonment if convicted on both counts charged in the information. He argues that the possibility of receiving a sentence in excess of six months, in effect, transformed the two petty offenses into a serious offense, thereby guaranteeing him the constitutional right to a jury trial. In

support of his claim that aggregation of the possible sentences is required when multiple petty offenses are charged in the same instrument, appellant emphasizes the Supreme Court's focus in both Baldwin and Blanton on an objective assessment of the seriousness of an offense as indicated primarily by the maximum authorized penalty.

The Supreme Court has not specifically addressed the issue of whether or not a defendant facing multiple counts that each carry a maximum sentence of six months or less, but which aggregate to a potential sentence in excess of six months imprisonment, is entitled to a jury trial. The language of the decisions in both Baldwin and Blanton, however, leads this Court to conclude that it is inappropriate to aggregate the maximum penalties of multiple petty offenses charged in the same instrument for the purpose of determining a defendant's right to a jury trial. In reaching this conclusion, the Court finds the reasoning of Judge Niemeyer in his dissent in United States v. Coppins, 953 F.2d 86 (4th Cir. 1991), persuasive.

The Supreme Court refers to a defendant's right to a jury trial being determined by the "seriousness of the offense". See Baldwin v. New York, 399 U.S. at 68; Blanton v. City of North Las Vegas, Nev., 489 U.S. at 542. "The meaningful constitutional object of inquiry is the *offense* with which the defendant is charged, not the accumulation of offenses tried on a given day or on a given charging document." Coppins, 953 F.2d at 92 (J. Niemeyer, dissenting). By focusing on the seriousness of the

offense charged, rather than the seriousness of defendant's overall conduct, the logical conclusion is that a defendant is entitled to a jury trial only if he faces a maximum sentence greater than six months for any single offense that is charged.

The maximum authorized penalty for a given offense is the primary objective factor to be considered in evaluating the seriousness of a particular offense. Blanton, 489 U.S. at 541. Recognizing that the legislature is in the best position to determine the severity of an offense, the Supreme Court cautioned that "[t]he judiciary should not substitute its judgment as to seriousness for that of a legislature, which is 'far better equipped to perform the task, and [is] likewise more responsive to changes in attitude and more amenable to the recognition and correction of their misperceptions in this respect.'" Id. at 541-42 (quoting Landry v. Hoepfner, 840 F.2d 1201, 1209 (5th Cir. 1988) (en banc), cert. denied, 489 U.S. 1083 (1989)). Similarly, the judiciary should not alter the legislature's determination of the seriousness of an offense by concluding without foundation that the legislature intended that commission of two petty offenses would equal a serious offense.

Appellant acknowledges that the government could have properly charged him in two separate criminal informations, each setting forth a single count of obstructing the mail in violation of 18 U.S.C. § 1701, and tried him on each count separately in different bench trials. Appellant concedes that he would not have been entitled to a jury trial under these circumstances even though if

convicted at both trials, he could have received consecutive prison terms, which in total exceeded six months.

Proceeding in this fashion is obviously inefficient and provides the defendant with no greater rights or procedural protections. The Court fails to comprehend how the administrative convenience achieved by trying multiple offenses in a single proceeding alters the seriousness of any of the charged offenses. As Judge Niemeyer so aptly observed, "[j]udicial efficiency imposed at no greater risk to the defendant should not change the standard for determining whether the defendant is given a jury trial." Coppins, 953 F.2d at 92 (dissenting).

In a related context, courts have declined to aggregate penalties to determine the jurisdiction of a magistrate judge. Pursuant to Section 3401(a) of Title 18, a United States Magistrate Judge has the authority to try misdemeanor offenses. Setting forth multiple misdemeanors in a charging instrument with the potential that consecutive sentences in excess of a year may be imposed does not transform these offenses into felonies and deprive the magistrate judge of jurisdiction. See United States v. Manjarrez-Arce, 382 F.Supp. 1046 (S.D.Ca.) (defendant charged with three misdemeanor offenses could be tried before a magistrate and upon conviction, sentenced by the magistrate to three consecutive terms of imprisonment of six months each), aff'd, 504 F.2d 426 (9th Cir. 1974), cert. denied, 419 U.S. 1112 (1975). "It is the grade of the offense, which the Congress has only addressed in terms of the length of the maximum term of imprisonment, which is determinative

of the magistrate's statutory jurisdiction." United States v. Raynor, 764 F.Supp. 1067, 1070 (D.Md. 1991) (where defendant was convicted before a magistrate on a misdemeanor offense, under 18 U.S.C. § 3401, the magistrate had jurisdiction to revoke defendant's supervised release even though revocation sentence, when added to the original sentence, may result in a term of imprisonment in excess of a year). Similarly, the charging of multiple petty offenses in one instrument does not transform them into a serious offense for the purpose of determining a defendant's right to a jury trial. The jurisdictional and procedural aspects of a case are determined by the nature of each offense charged, rather than the cumulative effect of all of the offenses charged in the information.

This Court has reviewed the opinions which support the appellant's argument for aggregating the maximum penalties of the charged offenses. In United States v. Coppins, 953 F.2d 86 (4th Cir. 1991), the defendant was charged in a single information with one count of trespassing on a military reservation, one count of assault by beating and one count of simple assault after engaging in a fight with military personnel who denied her entrance to the military post. The majority concluded that even though each of the charged offenses was by itself "petty", the defendant was entitled to a jury trial because she faced an aggregate sentence of fifteen months for all three counts. Similarly, in United States v. Musgrave, 695 F.Supp. 231 (W.D.Va. 1988), defendants charged with seven petty offenses arising out of an alleged continuous

conspiracy to violate the migratory bird and game animal laws were entitled to a jury trial because they faced a possible aggregate sentence for all of the offenses in excess of six months. See also United States v. O'Connor, 660 F.Supp. 955 (N.D.Ga. 1987) (defendant charged with two petty offenses, driving under the influence and reckless driving, is entitled to a jury trial because he faced a potential aggregate penalty of one year imprisonment); United States v. Coleman, 664 F.Supp. 548 (D.D.C. 1985) (defendants charged with two counts for loitering and congregating around the White House were entitled to a jury trial where aggregate maximum penalty was one year in prison). These decisions are not binding on this Court. For the reasons discussed previously, the Court does not believe that these opinions are correctly decided and declines to follow them.

In reaching this result, the Court notes that it does not accept as relevant the distinction the government seeks to draw between the facts of this case and the facts of the cases relied upon by the appellant. The government notes that where courts have aggregated the penalties, the multiple petty offenses arose out of a single criminal incident; whereas, here the appellant is charged with two petty offenses, each arising from a separate criminal act. On this basis, the government maintains that there is no authority to support the aggregation of penalties of multiple petty offenses for the purpose of determining a defendant's right to a jury trial where the offenses stem from multiple criminal incidents.

Inherent in the government's argument is the notion that

multiple petty offenses are somehow more serious when they arise from a single criminal act than when they stem from multiple criminal incidents. The Court finds this distinction to be unconvincing. In fact, if one were to distinguish at all between multiple offenses arising from a single incident and those arising from multiple incidents, it is the latter category that would often be considered more "serious". Separate and repeated incidents of criminal behavior would appear more serious and pose a greater likelihood that the defendant would be sentenced to consecutive terms of imprisonment than charges arising from one criminal episode. It is therefore not logical to distinguish between these two situations for the purpose of deciding whether or not to aggregate the maximum penalties of multiple petty offenses that are charged in the same document.[2]

The Court holds that a defendant charged with multiple offenses is entitled to a jury trial under the Sixth Amendment only if any one of the offenses carries a maximum sentence greater than six months.[3] Multiple petty offenses charged and tried together do not entitle a defendant to a trial by jury even if the defendant faces a potential aggregate sentence in excess of six months.

Appellant further argues that even if the Court determines

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[2]Appellant's argument that the offenses charged in the information actually constituted a single criminal incident or course of conduct, therefore need not be addressed.

[3]Given this holding, the Court does not reach the issue of whether the Magistrate's pre-trial guarantee that if convicted on both counts, defendant would not be sentenced to a term of imprisonment greater than six months, operated to eliminate any claim by the defendant that he is entitled to a jury trial.

that aggregation of the maximum potential sentences for each petty offense is not appropriate, he was entitled to a jury trial because he faced the possibility of an additional statutory penalty that rendered the offense "serious". Pursuant to 18 U.S.C. § 3563(b)(6), the Court had the authority to order appellant to give up his job as a postal worker as a condition of a sentence of probation. Prior to trial, Magistrate Judge Azrack concluded that this potential additional statutory penalty did not render the charged offense "serious".[4] The Court agrees with the Magistrate's conclusion that the additional economic penalty appellant possibly faced is not sufficient to transform the petty offense of 18 U.S.C. § 1701 into a "serious" offense for purposes of determining the jury trial right.

In Blanton, the Supreme Court expanded the consideration of objective indications of the seriousness of an offense to include "any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration". Blanton, 489 U.S. at

[4]In reaching this conclusion, Magistrate Azrack found United States v. Stoklasa, 1992 WL 77550 (S.D.N.Y. 1992) (denying defendant's application for a jury trial finding that 18 U.S.C. § 1701 was a "petty" offense because it provided for a maximum sentence of six months' imprisonment and a $5,000 fine) to be directly on point. The court in Stoklasa rejected defendant's argument that the potential collateral consequences of losing his job as a postal worker transformed the offense from petty to serious stating that such consequences "flow not from any criminal penalty mandated by Congress, but from the policies adopted by the United States Postal Service." Stoklasa, at *2. Although Stoklasa appears to reach the appropriate conclusion, that 18 U.S.C. § 1701 is a "petty" offense for the purpose of determining a defendant's right to a jury trial, the court never considered the implication of 18 U.S.C. § 3563(b)(6) in this determination and therefore cannot be considered controlling.

543. The Court cautioned, however, that it would be the "rare" occasion that the legislature would impose additional statutory penalties that were sufficient to render an otherwise petty offense, serious. Id.

Most recently, the Supreme Court has held that driving under the influence of alcohol in a national park, with a maximum penalty of six months' imprisonment and a fine of $5,000, was a petty offense for the purpose of determining defendant's right to a jury trial even though the defendant faced an alternative sentence of five years probation. United States v. Nachtigal, 113 S.Ct. 1072 (1993). The Court concluded:

> Nor do we believe that the parole alternative renders the DUI offense 'serious.' Like a monetary penalty, the liberty infringement caused by a term of probation is far less intrusive than incarceration. The discretionary probation conditions do not alter this conclusion; while they obviously entail a greater infringement on liberty than probation without attendant conditions, they do not approximate the severe loss of liberty caused by imprisonment for more than six months.

Id. at 1074.[5] The Court's emphasis on the fundamental difference between a sentence of incarceration and a sentence of probation undermines appellant's argument that the potential penalty of losing his job as a condition of probation is sufficient to render the charged offense "serious".

[5]The Court specifically referenced the discretionary conditions that may be imposed pursuant to 18 U.S.C. § 3563(b). Nachtigal, 113 S.Ct. at 1074, fn.*. However, the defendant in Nachtigal was not subject to the particular condition at issue here, § 3563(b)(6).

The only case appellant cites where a court found that the additional statutory penalties rendered the charged petty offense, "serious", is Richter v. Fairbanks, 903 F.2d 1202 (8th Cir. 1990). In that case, the Eighth Circuit found that a mandatory fifteen year license revocation, in addition to a maximum prison term of six months, rendered a third offense DWI "serious", thereby affording defendant the right to a jury trial. The holding in Richter is consistent with the language of Nachtigal and Blanton which indicates that it is statutory penalties that may be imposed in addition to a period of incarceration that potentially afford a defendant the right to a jury trial for an otherwise petty offense. See Nachtigal, 113 S.Ct. at 1073; Blanton, 489 U.S. at 543. Here, the authority of the Court pursuant to § 3563(b)(6) to order the defendant to relinquish his job at the Post Office is only as a condition of probation. There is no authority for the Court to mandate his dismissal together with a term of imprisonment. Accordingly, the potential for job loss does not render the offense serious.

CONCLUSION

The Magistrate Judge did not err in refusing to grant appellant a jury trial. Where a defendant is charged with multiple petty offenses in a single document, the potential maximum sentences for the offenses should not be aggregated for the purpose of determining whether the individual is entitled to a jury trial. Furthermore, the possibility of appellant being required to

relinquish his job as a postal employee as a condition of a sentence of probation was not sufficient to render the charged offenses "serious". Therefore, appellant was not entitled to a jury trial and his conviction is hereby affirmed.

Dated: Brooklyn, New York
December 7, 1994

Carol Bagley Amon
United States District Judge

(4)

Supreme Court, U.S.
FILED
FEB 27 1996
CLERK

No. 95-6465

In The

Supreme Court of the United States

October Term, 1995

RAY A. LEWIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

JOINT APPENDIX

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Transcript of Hearing, February 24, 1994

* * *

[2] THE CLERK: Criminal Cause for Status CR-93-1342 (JMA), United States versus Ray A. Lewis. For the government Jim Walden and Mark Kirsch. For the defense Cynthia Matthews and Jan Roston.

THE COURT: Okay. Do you want to be heard?

MR. WALDEN: Yes, your Honor. Your Honor, there's two things to say in this case. First of all, the aggregation rule, if it applies at all, applies only to incidents where there's a single criminal incident. And every case that's cited, that discusses the aggregation rule, discusses it in the context of a single criminal incident. The most telling case in [sic] the one the defense sites in their latest papers is the Musgrave (Ph) case.

In the Musgrave case in one passage discusses both the theory underlying the aggregation rule and the fact that in this case there was only a single criminal incident. And if your Honor likes, I'll read it. Because modern criminal codes permit multiple charges to flow from single discrete acts of criminality, a criminal prosecution can threaten a defendant with consequences of a series of events. Even though the defendant is not charged with an offense which is deemed a serious offense, I think the papers are clear, and the FMS case further supports that.

The defense counsel has cited in their latest papers that it was affirmed by the Second Circuit. That's not [3] the case. That opinion never went up on appeal, and the Second Circuit case only affirmed the underlying conviction and discussed a separate statutory section.

Second, your Honor, to the extent that you would normally hold that the aggregation rule applies, the government would ask that you rely on Section 18 USC Section 3584, and rule in advance that there will be concurrent sentences here rather than consecutive sentences.

The latest opinion to come out of the Tenth Circuit, the Bencheck (Ph) case, supports this, and in discussing the rational [sic] in the Bencheck case, the Court discusses the other two precedents that defense counsel relies on, that being the Potvin (Ph) case, and the Har (Ph) versus Hanrahan (Ph) case. And it purports to be the latest Tenth Circuit descision [sic] on this issue. In that case, the judge, the trial judge ruled in advance, that under no circumstances would he sentence the defendant to more than six months. And then as a result, the Tenth Circuit said that he wasn't entitled to a jury trial under those facts.

Here, if your Honor wished to rule under Section 3584, the same situation would apply. Under either theory though, your Honor, the defendant would not be entitled to a jury trial in this case, and the government requests a bench trial.

THE COURT: And do you want to address the [4] collateral consequences beyond your papers?

MR. WALDEN: Your Honor, I think my papers speak for themselves in that regard.

THE COURT: Now, Miss Matthews, what about Section 3584?

MS. MATTHEWS: Well –

THE COURT: If I say today I am under no circumstances, there will be no circumstances under which I will sentence Mr. Lewis to more than six months, what's your position? Or your position Miss Roston or, someone's position?

MS. MATTHEWS: I still think that we need a jury trial. The only authority for that is the Bencheck case, and there – I'd have to look at it again. I seem to remember dissenting opinion in the Bencheck case, the reasoning of which I thought was pretty sound. And that is that if the principle – the principles of Baldwin are to – are to be followed, then you can't simply say at the beginning that you're willing to trump the statutory mandated penalty or statutory available penalty. What Baldwin referred to was the statutory penalty that was available at the onset, and you can't simply say I'm only going to enforce that for six months.

THE COURT: But that's what makes it serious, is the threat of a year in prison.

MS. MATTHEWS: But there was – what makes a crime serious is what the people in an acting legislation call serious [5] by specifying penalties.

THE COURT: Except that all the cases that analyze it talk about the fact that you can be sentenced to a year in prison. That seems to be the factor.

MS. MATTHEWS: Right, but that is so because the courts are concerned about what the legislation says by an objective test, what the legislation says, not what the actual term of imprisonment is going to be. I mean, in

any of these cases where you're talking about traditionally petty offenses, rarely are these people ever sent to jail for any period of time. I mean, everyone knows that this is sort of an academic exercise to begin with.

So, if we're talking about what actual sentences that are going to be imposed, then we're not talking about anything that's going to matter. And what these cases talk about is how these crimes are viewed legislatively in terms of the maximum penalties that could be imposed. That makes them serious; not necessarily that any Court is going to say, I'm only going to impose six months or a year or probation, that doesn't really matter. What matters to make it serious is what the legislature has said the seriousness of the crime is as expressed by the maximum penalty that they've written into the statute.

THE COURT: Anything else?

MR. WALDEN: Yes. May I respond, your Honor?

[6] It seems to me, your Honor, that defense counsel is arguing on both sides of the fence here. When they want to get around the possibility of you ordering concurrent sentences, they say that when the Supreme Court talked about the projected indicators in Blantin (Ph), they're talking about the statute. And if the statute applies here, then 18 USC, Section 19 defines these crimes as petty, and nothing in Section 19 says that you aggregate, that would be an exception to Blantin.

But then, when it comes to trying to get around the fact that Blantin says look at the statute, then they say, oh, well, then the objective indicator here is the maximum

penalty that the defendant should be subject to. And then they say you have to aggregate. It doesn't seem like both positions can be simultaneously maintained, your Honor.

THE COURT: That's a good point. Do you want to respond?

MS. MATTHEWS: The point being?

THE COURT: The point being that – when you want to get around me saying that I'm not going to sentence to more than six months, you say you have to look at the statutory language. And when you don't want me to look at the statutory language which defines this as a petty offense, you don't want me to look at that, that part of the statutory language.

MS. MATTHEWS: Which are, but Baldwin – I mean none of those cases have ever looked to the term petty offense [7] to define whether a case – a crime is serious for purposes of triggering the Sixth Amendment right to a jury trial. I mean, the fact that it's called a petty offense by statute, doesn't automatically, you know, vitiate any right to a jury trial. I mean, we're not arguing that at all. I mean, I don't care what the statute calls it. What the cases say is that you have to look to the objective criteria in the statute, and that that is the potential penalty to be imposed. That's what you look to to determine whether it's serious.

The legislature can call it petty or felony or misdemeanor or whatever they want.

THE COURT: But, you have to admit the cases go both ways. It's not so clear that your position is etched in stone in the case law.

MS. MATTHEWS: The position about aggregation or the position –

THE COURT: That this is serious and warrants jury trial.

MS. MATTHEWS: On aggregation grounds?

THE COURT: Yes.

MS. MATTHEWS: I think it's pretty clear. I mean, what –

THE COURT: That you aggregate?

MS. MATTHEWS: That you aggregate the two. If there are two counts in the indictment, that you aggregate the [8] two.

THE COURT: In situations like this, I –

MS. MATTHEWS: I think where they're – particularly like this, whether they're clearly related.

THE COURT: Related why?

MS. MATTHEWS: Related because it's the same course of conduct that they say Mr. Lewis was engaging in. I mean I don't even think, as I said – as we said in the letter, I don't even think you need to get into that analysis. But the government has engaged in it, and I think even –

THE COURT: What incident?

MS. MATTHEWS: Well, the government is pointing out that where they aggregate it really stems from one criminal incident. Isn't that your argument?

MR. WALDEN: It is my argument.

MS. MATTHEWS: But it doesn't in the cases. It doesn't in the cases. I mean there's no case that we have seen that discusses – there's no case that we have seen that says you shouldn't aggregate in this situation because these are distinct criminal acts. Rather, they all analyze the problem as two counts and, therefore, should be aggregated. And in many of those cases, as we pointed out in the letter, it's clear from the facts and from the record, particularly in the FMC case, that they were distinct acts.

I mean that's the case where there were 96 birds, [9] or whatever, that were killed over a period of time, and the government had charged birds in different counts, clearly those birds were killed on different occasions.

MR. WALDEN: May I respond, your Honor?

THE COURT: Uh huh.

MR. WALDEN: Your Honor, the FMS case –

THE COURT: FMC.

MR. WALDEN: Oh, I thought it was FMS, your Honor.

MS. MATTHEWS: It's FMC.

MR. WALDEN: It the FMC case, your Honor, there was one criminal act. They discharged pollutants into a lagoon. The birds, as the Second Circuit opinion clearly states, the counts were based on when the birds were found, not when the pollution was discharged into the lake. And that is a perfect case to show your Honor exactly why the aggregation rule applies where it does.

There was one criminal act, and the government went haywire, and charged 36 counts based on different species of birds that were discovered at different times. Your Honor, I will stipulate in that kind of a situation –

THE COURT: Yes.

MR. WALDEN: That if I were a judge, I would apply the aggregation rule too. But it doesn't apply here, where there were two separate incidents, and if we brought the trial [10] – if we had brought charges on each – on two informations which we were entitled to do, there is no dispute here that this would be a bench trial in each case and that your Honor could sentence him consecutively in both.

MS. MATTHEWS: Wait a second. I mean, I think we do take issue with the way the government – the way the government describes the facts in FMC. It's clear from the Second Circuit opinion that the discharge of the pollutants occurred over, I think it was a three month time – two or three month time period, which means that they charged – whether they picked as the days that they put in the indictment the days the birds were found or not, they're charging separate acts of discharging pollution which killed different birds on different days. It's not any different than Mr. Lewis' case.

THE COURT: Oh, yes it is. Oh, it's very different than Mr. Lewis' case. I mean, it's the same – isn't Potvin the one about the lumber?

MS. ROSTEL: And there are two different discrete acts in that as well, where if someone is first chopping timber, and then building a shelter on property. It

must have taken – it couldn't have taken one day. It must have been over, you know, a period of time.

THE COURT: Well, there were two discrete acts in Potvin. One was actually the trespass on the public land and making a shelter there. They put up tents on public lands.

[11] The second act was the chopping of timber and building a structure on public land. And that again occurred over a time period.

MR. WALDEN: Your Honor, if I could respond. The holding in Potvin directly contradicts that reading of the case. The Court says specifically that there is an aggregation rule where the offenses stem from closely related –

THE COURT: From a single criminal.

MR. WALDEN: Closely related and arose out of the same acts.

MS. MATTHEWS: And there it is. That's exactly what the –

THE COURT: Yeah, but the acts there are really – it's one criminal incident. It's not two separate days of retarding the passage of the mail.

MS. MATTHEWS: It's the same in terms of identity, the same types of acts.

THE COURT: No.

MS. MATTHEWS: I mean we're talking about transaction, criminal transaction.

MS. ROSTEL: It is the same.

THE COURT: You have –

MS. ROSTEL: A person that is instituting, as well as the fact that in –

THE COURT: What are you saying? You aggregate [12] every time you have the same victim?

MS. ROSTEL: No, I'm talking about in terms of figuring out what a transaction is, okay –

THE COURT: This, I don't see how you could ever argue that this case would be a single criminal incident.

MS. ROSTEL: I think there are factors that you should look to such as, and I think that the cases that look to, that define a transaction under Rule 8A, for example, which, first of all, the principle is that you would need to look at a transaction in a broad way. You look at the relationship between the acts.

THE COURT: But there is no way this is a single – I mean I could hear you people make a severance argument too. If you ever wanted to make a severance argument, you'd be arguing the flip side. I mean, if they charged him with retarding the passage of the mail, and then some other mail related offense based on his conduct on one day, then you'd have it; like, I retarded the passage of the mail, then he stole mail and then he did whatever else with those items of mail. Then you'd have a single criminal incident, but not two separate days as I see the information.

MS. ROSTEL: I don't think that sways, based on the fact that they are two separate days, the cases that we cited to you indicating that they have happened on separate days.

[13] THE COURT: It's not even like he went back to the same barrel of mail. I mean, I just don't see how the facts are in your favor under this analysis at all in terms of analyzing it as a single criminal incident.

All right. Anything else?

MR. WALDEN: Nothing from the government, your Honor.

MS. ROSTEL: I think our positions are stated in the –

THE COURT: I mean, you're very interesting. I frankly – it's interesting. I'm going to deny your application. I am going to say and state on the record, that I am not going to sentence Mr. Lewis to more than six months in prison under any circumstances pursuant to 3584. With regard to the collateral consequences argument, I don't believe that the potential collateral consequences here make 1701 a serious offense, and I find Magistrate Dollenger's opinion in the Stocosa (Ph) case exactly on point, and I would adopt his reasoning in denying your application on that basis. So, we'll go tomorrow –

MS. MATTHEWS: What time do we have this?

THE CLERK: It's scheduled for 9:30.

THE COURT: All right.

MR. WALDEN: Thank you, your Honor.

MR. KIRSCH: Thank you, your Honor.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Appellee,

-against-

DECISION
93-CR-1342 (CBA)

RAY A. LEWIS,

Defendant-Appellant.

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AMON, U.S. DISTRICT JUDGE

INTRODUCTION

Appellant, Ray Lewis, was convicted on February 25, 1994, after a bench trial before Magistrate Judge Azrack, on two counts of obstructing the mail in violation of 18 U.S.C. § 1701. The appellant challenges his conviction claiming that he was charged with a "serious" offense and was thus constitutionally entitled to a jury trial. For the reasons set forth below, the Court finds that appellant was not entitled to a jury trial and his conviction is hereby affirmed.

BACKGROUND

Appellant was charged in a two-count information with knowingly obstructing the passage of mail in violation of 18 U.S.C. § 1701 on June 3, 1992 and on June 4, 1992. Each count carried a maximum sentence of six months' imprisonment, a fine of one hundred dollars and a ten dollar special assessment.

Over appellant's objection, the government moved that the appellant be tried non-jury. Upon granting the government's motion for a non-jury trial, the Magistrate Judge stated affirmatively that if defendant was convicted on both counts, under no circumstances would she impose a term of imprisonment greater than six months pursuant to 18 U.S.C. § 3584.[1]

Defendant was subsequently convicted of both counts and was sentenced to three years probation on each count, with the sentences to run concurrently. Defendant appeals his conviction claiming that it was error to deny him the constitutional right to a jury trial.

DISCUSSION

In *Baldwin v. New York*, the Supreme Court reaffirmed the long-standing principle that the Sixth Amendment mandates that a defendant charged with a "serious" offense is entitled to a trial by jury, while a defendant charged with a "petty" offense may be tried without a jury. *Baldwin v. New York*, 399 U.S. 66, 68 (1970) (plurality opinion) (citing *Duncan v. Louisiana*, 391 U.S. 145 (1968)). "In deciding whether an offense is 'petty,' we have sought objective criteria reflecting the seriousness with which society regards the offense . . . and we have found the most relevant such criteria in the severity of the

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[1] 18 U.S.C. § 3584 provides in relevant part that "[i]f multiple terms of imprisonment are imposed on a defendant at the same time . . . the terms may run concurrently or consecutively . . . Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively."

maximum authorized penalty." *Id.* at 68 (citations omitted). The Court held that a potential sentence in excess of six months imprisonment is sufficiently severe by itself to render an offense "serious". *Id.* at 69.

In *Blanton v. City of North Las Vegas, Nev.*, 489 U.S. 538 (1989), the Supreme Court revisited the issue of distinguishing a serious offense from a petty offense for the purpose of determining a defendant's right to a jury trial. After declining to hold that an offense carrying a maximum prison term of six months or less is automatically a "petty" offense, the Court held that such offenses are presumed to be petty for purposes of the Sixth Amendment's right to a jury trial. The Court explained:

> A defendant is entitled to a jury trial in such circumstances only if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one. This standard, albeit somewhat imprecise, should ensure the availability of a jury trial in the rare situation where a legislature packs an offense it deems 'serious' with onerous penalties that nonetheless do not puncture the 6-month incarceration line.

Id. at 543.

The parties do not dispute that the conduct prescribed by 18 U.S.C. § 1701 is a "petty" offense; however, appellant claims that he was entitled to a jury trial because he faced an aggregate possible sentence of 12 months imprisonment if convicted on both counts

charged in the information. He argues that the possibility of receiving a sentence in excess of six months, in effect, transformed the two petty offenses into a serious offense, thereby guaranteeing him the constitutional right to a jury trial. In support of his claim that aggregation of the possible sentences is required when multiple petty offenses are charged in the same instrument, appellant emphasizes the Supreme Court's focus in both *Baldwin* and *Bianton* on an objective assessment of the seriousness of an offense as indicated primarily by the maximum authorized penalty.

The Supreme Court has not specifically addressed the issue of whether or not a defendant facing multiple counts that each carry a maximum sentence of six months or less, but which aggregate to a potential sentence in excess of six months imprisonment, is entitled to a jury trial. The language of the decisions in both *Baldwin* and *Blanton*, however, leads this Court to conclude that it is inappropriate to aggregate the maximum penalties of multiple petty offenses charged in the same instrument for the purpose of determining a defendant's right to a jury trial. In reaching this conclusion, the Court finds the reasoning of Judge Niemeyer in his dissent in *United States v. Coppins*, 953 F.2d 86 (4th Cir. 1991), persuasive.

The Supreme Court refers to a defendant's right to a jury trial being determined by the "seriousness of the offense". *See Baldwin v. New York*, 399 U.S. at 68; *Blanton v. City of North Las Vegas, Nev.*, 489 U.S. at 542. "The meaningful constitutional object of inquiry is the offense with which the defendant is charged, not the accumulation of offenses tried on a given day or on a given charging

document." *Coppins*, 953 F.2d at 92 (J. Niemeyer, dissenting). By focusing on the seriousness of the offense charged, rather than the seriousness of defendant's overall conduct, the logical conclusion is that a defendant is entitled to a jury trial only if he faces a maximum sentence greater than six months for any single offense that is charged.

The maximum authorized penalty for a given offense is the primary objective factor to be considered in evaluating the seriousness of a particular offense. *Blanton*, 489 U.S. at 541. Recognizing that the legislature is in the best position to determine the severity of an offense, the Supreme Court cautioned that "[t]he judiciary should not substitute its judgment as to seriousness for that of a legislature, which is 'far better equipped to perform the task, and [is] likewise more responsive to changes in attitude and more amenable to the recognition and correction of their misperceptions in this respect.' " Id. at 541-42 (quoting *Landry v. Hoepfner*, 840 F.2d 1201, 1209 (5th Cir. 1988) (en banc), *cert. denied*, 489 U.S. 1083 (1989)). Similarly, the judiciary should not alter the legislature's determination of the seriousness of an offense by concluding without foundation that the legislature intended that commission of two petty offenses would equal a serious offense.

Appellant acknowledges that the government could have properly charged him in two separate criminal informations, each setting forth a single count of obstructing the mail in violation of 18 U.S.C. § 1701, and tried him on each count separately in different bench trials. Appellant concedes that he would not have been entitled to a jury trial under these circumstances even

though if convicted at both trials, he could have received consecutive prison terms, which in total exceeded six months.

Proceeding in this fashion is obviously inefficient and provides the defendant with no greater rights or procedural protections. The Court fails to comprehend how the administrative convenience achieved by trying multiple offenses in a single proceeding alters the seriousness of any of the charged offenses. As Judge Niemeyer so aptly observed, "[j]udicial efficiency imposed at no greater risk to the defendant should not change the standard for determining whether the defendant is given a jury trial." *Coppins*, 953 F.2d at 92 (dissenting).

In a related context, courts have declined to aggregate penalties to determine the jurisdiction of a magistrate judge. Pursuant to Section 3401(a) of Title 18, a United States Magistrate Judge has the authority to try misdemeanor offenses. Setting forth multiple misdemeanors in a charging instrument with the potential that consecutive sentences in excess of a year may be imposed does not transform these offenses into felonies and deprive the magistrate judge of jurisdiction. *See United States v. Manjarrez-Arce*, 392 F.Supp. 1046 (S.D.Ca.) (defendant charged with three misdemeanor offenses could be tried before a magistrate and upon conviction, sentenced by the magistrate to three consecutive terms of imprisonment of six months each), *aff'd*, 504 F.2d 426 (9th Cir. 1974), *cert. denied*, 419 U.S. 1112 (1975). "It is the grade of the offense, which the Congress has only addressed in terms of the length of the maximum term of imprisonment, which is determinative of the magistrate's statutory jurisdiction." *United States v. Raynor*, 764 F.Supp. 1067,

1070 (D.Md. 1991) (where defendant was convicted before a magistrate on a misdemeanor offense, under 18 U.S.C. § 3401, the magistrate had jurisdiction to revoke defendant's supervised release even though revocation sentence, when added to the original sentence, may result in a term of imprisonment in excess of a year). Similarly, the charging of multiple petty offenses in one instrument does not transform them into a serious offense for the purpose of determining a defendant's right to a jury trial. The jurisdictional and procedural aspects of a case are determined by the nature of each offense charged, rather than the cumulative effect of all of the offenses charged in the information.

This Court has reviewed the opinions which support the appellant's argument for aggregating the maximum penalties of the charged offenses. In *United States v. Coppins*, 953 F.2d 86 (4th Cir. 1991), the defendant was charged in a single information with one count of trespassing on a military reservation, one count of assault by beating an done count of simple assault after engaging in a fight with military personnel who denied her entrance to the military post. The majority concluded that even though each of the charged offenses was by itself "petty", the defendant was entitled to a jury trial because she faced an aggregate sentence of fifteen months for all three counts. Similarly, in *United States v. Musgrave*, 695 F.Supp. 231 (W.D.Va. 1988), defendants charged with seven petty offenses arising out of an alleged continuous conspiracy to violate the migratory bird and game animal laws were entitled to a jury trial because they faced a possible aggregate sentence for all of the offenses in excess of six months. *See also United States v. O'Connor*, 660 F.Supp. 955

(N.D.Ga. 1987) (defendant charged with two petty offenses, driving under the influence and reckless driving, is entitled to a jury trial because he faced a potential aggregate penalty of one year imprisonment); *United States v. Coleman*, 664 F.Supp. 548 (D.D.C. 1985) (defendants charged with two counts for loitering and congregating around the White House wore entitled to a jury trial where aggregate maximum penalty was one year in prison). These decisions are not binding on this Court. For the reasons discussed previously, the Court does not believe that these opinions are correctly decided and declines to follow them.

In reaching this result, the Court notes that it does not accept as relevant the distinction the government seeks to draw between the facts of this case and the facts of the cases relied upon by the appellant. The government notes that where courts have aggregated the penalties, the multiple petty offenses arose out of a single criminal incident; whereas, here the appellant is charged with two petty offenses, each arising from a separate criminal act. On this basis, the government maintains that there is no authority to support the aggregation of penalties of multiple petty offenses for the purpose of determining a defendant's right to a jury trial where the offenses stem from multiple criminal incidents.

Inherent in the government's argument is the notion that multiple petty offenses are somehow more serious when they arise from a single criminal act than when they stem from multiple criminal incidents. The Court finds this distinction to be unconvincing. In fact, if one were to distinguish at all between multiple offenses arising from a single incident and those arising from multiple

incidents, it is the latter category that would often be considered more "serious". Separate and repeated incidents of criminal behavior would appear more serious and pose a greater likelihood that the defendant would be sentenced to consecutive terms of imprisonment than charges arising from one criminal episode. It is therefore not logical to distinguish between these two situations for the purpose of deciding whether or not to aggregate the maximum penalties of multiple petty offenses that are charged in the same document.[2]

The Court holds that a defendant charged with multiple offenses is entitled to a jury trial under he Sixth Amendment only if any one of the offenses carries a maximum sentence greater than six months.[3] Multiple petty offenses charged and tried together do not entitle a defendant to a trial by jury even if the defendant faces a potential aggregate sentence in excess of six months.

Appellant further argues that even if the Court determines that aggregation of the maximum potential sentences for each petty offense is not appropriate, he was entitled to a jury trial because he faced the possibility of an additional statutory penalty that rendered the offense "serious". Pursuant to 18 U.S.C. § 3563(b)(6), the Court

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[2] Appellant's argument that the offenses charged in the information actually constituted a single criminal incident or course of conduct, therefore need not be addressed.

[3] Given this holding, the Court does not reach the issue of whether the Magistrate's pre-trial guarantee that if convicted on both counts, defendant would not be sentenced to a term of imprisonment greater than six months, operated to eliminate any claim by the defendant that he is entitled to a jury trial.

had the authority to order appellant to give up his job as a postal worker as a condition of a sentence of probation. Prior to trial, Magistrate Judge Azrack concluded that this potential additional statutory penalty did not render the charged offense "serious".[4] The Court agrees with the Magistrate's conclusion that the additional economic penalty appellant possibly faced is not sufficient to transform the petty offense of 28 U.S.C. § 1701 into a "serious" offense for purposes of determining the jury trial right.

In *Blanton*, the Supreme Court expanded the consideration of objective indications of the seriousness of an offense to include "any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration". *Banton*, 489 U.S. at 543. The Court cautioned, however, that it would be the "rare" occasion that the legislature would impose additional statutory penalties that were sufficient to render an otherwise petty offense, serious. *Id.*

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[4] In reaching this conclusion, Magistrate Azrack found *United States v. Stoklasa*, 1992 WL 77550 (S.D.N.Y. 1992) (denying defendant's application for a jury trial finding that 18 U.S.C. § 1701 was a "petty" offense because it provided for a maximum sentence of six months' imprisonment and a $5,000 fine) to be directly on point. The court in *Stoklasa* rejected defendant's argument that the potential collateral consequences of losing his job as a postal worker transformed the offense from petty to serious stating that such consequences "flow not from any criminal penalty mandated by Congress, but from the policies adopted by the United States Postal Service." *Stoklasa*, at *2. Although *Stoklasa* appears to reach the appropriate conclusion, that is U.S.C. § 1701 is a "petty" offense for the purpose of determining a defendant's right to a jury trial, the court never considered the implication of 18 U.S.C. § 3563(b)(6) in this determination and therefore cannot be considered controlling.

Most recently, the Supreme Court has held that driving under the influence of alcohol in a national park, with a maximum penalty of six months' imprisonment and a fine of $5,000, was a petty offense for the purpose of determining defendant's right to a jury trial even though the defendant faced an alternative sentence of five years probation. *United States v. Nachtigal*, 113 S.Ct. 1072 (1993). The Court concluded:

> Nor do we believe that the parole alternative renders the DUI offense 'serious.' Like a monetary penalty, the liberty infringement caused by a term of probation is far less intrusive than incarceration. The discretionary probation conditions do not alter this conclusion; while they obviously entail a greater infringement on liberty than probation without attendant conditions, they do not approximate the severe loss of liberty caused by imprisonment for more than six months.

Id. at 1074.[5] The Court's emphasis on the fundamental difference between a sentence of incarceration and a sentence of probation undermines appellant's argument that the potential penalty of losing his job as a condition of probation is sufficient to render the charged offense "serious".

The only case appellant cites where a court round that the additional statutory penalties rendered the

[5] The Court specifically referenced the discretionary conditions that may be imposed pursuant to 18 U.S.C. § 3563(b). *Nachtigal*, 113 S.Ct. at 1074, fn.*. However, the defendant in *Nachtigal* was not subject to the particular condition at issue here, § 3563(b)(6).

charged petty offense, "serious", is *Richter v. Fairbanks*, 903 F.2d 1202 (8th Cir. 1990). In that case, the Eighth Circuit found that a mandatory fifteen year license revocation, in addition to a maximum prison term of six months, rendered a third offense DWI "serious", thereby affording defendant the right to a jury trial. The holding in *Richter* is consistent with the language of *Nachtigal* and *Blanton* which indicates that it is statutory penalties that may be imposed in addition to a period of incarceration that potentially afford a defendant the right to a jury trial for an otherwise petty offense. *See Nachigal*, 113 S.Ct. at 1073; *Blanton*, 489 U.S. at 543. Here, the authority of the Court pursuant to § 3563(b)(6) to order the defendant to relinquish his job at the Post Office is only as a condition of probation. There is no authority for the Court to mandate his dismissal together with a term of imprisonment. Accordingly, the potential for job loss does not render the offense serious.

CONCLUSION

The Magistrate Judge did not err in refusing to grant appellant a jury trial. Where a defendant is charged with multiple petty offenses in a single document, the potential maximum sentences for the offenses should not be aggregated for the purpose of determining whether the individual is entitled to a jury trial. Furthermore, the possibility of appellant being required to relinquish his job as a postal employee as a condition of a sentence of probation was not sufficient to render the charged

offenses "serious". Therefore, appellant was not entitled to a jury trial and his conviction is hereby affirmed.

Dated: Brooklyn, New York
December 7, 1994

/s/ Carol Bagley Amon
Carol Bagley Amon
United States
District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1698 – August Term, 1994

(Argued: June 20, 1995 Decided: September 5, 1995)

Docket No. 94-1701

UNITED STATES OF AMERICA,

Appellee,

-v.-

RAY A. LEWIS,

Defendant-Appellant.

Before:

KEARSE, ALTIMARI and PARKER,
Circuit Judges.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Amon, *J.*), convicting defendant-appellant Ray Lewis, following a bench trial, of two counts of obstructing the mails, in violation of 18 U.S.C. § 1701.

Affirmed.

ALTIMARI, *Circuit Judge:*

Defendant-appellant Ray Lewis ("Lewis") appeals from a judgment of the United States District Court for the Eastern District of New York (Amon, *J.*), convicting him, following a bench trial, of two counts of obstructing

the mails. Lewis contends that he was improperly denied a jury trial in light of the fact that the maximum potential aggregate sentence for his two charges exceeded six months. The district court, however, held that, for the purpose of determining a defendant's right to a jury trial, penalties should not be aggregated. Because Congress has given no indication that multiple offenses are more serious by virtue of their multiplicity than are single offenses of the same nature, the right to a jury trial cannot depend upon the maximum potential aggregate term of incarceration. Accordingly, we affirm the judgment of the district court.

BACKGROUND

Lewis, a postal worker, was charged with two counts of obstructing the mail in violation of 18 U.S.C. § 1701. The maximum sentence for each count was six months' imprisonment, a hundred dollar fine and a ten dollar special assessment. Prior to trial, the government moved to have Lewis tried without a jury. Magistrate Judge Azrack granted the government's motion, but stated that she would not "sentence Mr. Lewis to more than six months in prison under any circumstances. . . . " On February 25, 1994, Lewis was convicted of both counts and sentenced to three years of probation on each count to run concurrently.

Lewis appealed the denial of a jury trial to the district court, which on December 7, 1994 affirmed Magistrate Judge Azrack's determination. The district court held that the right to a jury trial was not determined by the severity of the sentences for the offenses in their

aggregate, but rather by the severity of the sentences for each charge individually. Thus, according to the district court, "a defendant is entitled to a jury trial only if he faces a maximum sentence greater than six months for any single offense that is charged."

Lewis now appeals the determination of the district court.

DISCUSSION

The United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . . " U.S. Const. amend. VI. Despite the absolute language of the Sixth Amendment, the Supreme Court has made clear that a jury trial is required for only those offenses that are "serious" in nature; bench trials are sufficient for "petty" offenses. *See Duncan v. Louisiana*, 391 U.S. 145, 159-62 (1968).

In order to determine whether or not an offense is "serious," the Supreme Court has looked to "objective criteria." *Baldwin v. New York*, 399 U.S. 66, 68 (1970) (plurality opinion). According to the Court, the best objective indicator of the seriousness of an offense is "the severity of the maximum authorized penalty." *Id.* Implicit in the maximum penalty is Congress's view as to the seriousness of that crime. *See Blanton v. North Las Vegas*, 489 U.S. 538, 541 (1989); *Frank v. United States*, 395 U.S. 147, 148 (1969). The legislature is better equipped than is the judiciary to measure public sentiment as to the seriousness of respective offenses and is more responsive to changes in the public attitude. *See Blanton*, 489 U.S. at

541-42; *see also Landry v. Hoepfner*, 840 F.2d 1201, 1209 (5th Cir. 1988) (en banc), *cert. denied*, 489 U.S. 1083 (1989). Thus, the maximum authorized penalty for a particular offense is a strong indicator of the present sentiment as to the seriousness of that crime.

While courts are instructed to look at all potential modes of punishment for a particular offense (e.g. incarceration, probation, fines, etc.), "[p]rimary emphasis . . . must be placed on the maximum authorized period of incarceration." *Blanton*, 489 U.S. at 542. Regardless of any other possible punishment, the Supreme Court has determined that "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized." *Baldwin*, 399 U.S. at 69. Accordingly, any defendant facing in excess of six months incarceration for a single offense is entitled to a jury trial.

The question which remains unanswered by the Supreme Court, however, is whether an individual potentially facing over six months imprisonment for multiple petty offenses is entitled to a jury trial. Those courts which have addressed this question to date are in agreement that potential sentences must be aggregated to determine the right to a jury trial. *See United States v. Coppins*, 953 F.2d 86, 90 (4th Cir. 1991); *United States v. Bencheck*, 926 F.2d 1512, 1518 (10th Cir. 1991); *Rife v. Godbehere*, 814 F.2d 563, 565 (9th Cir. 1987); *see also United States v. Musgrave*, 695 F. Supp. 231, 233 (W.D. Va. 1988); *United States v. O'Connor*, 660 F. Supp. 955, 956 (N.D. Ga. 1987); *United States v. Coleman*, 664 F. Supp. 548, 549 (D.D.C. 1985); *United States v. FMC Corp.*, 428 F. Supp. 615, 620 (W.D.N.Y. 1977), *aff'd on other grounds*, 572 F.2d

902 (2d Cir. 1978). These courts reason, in essence, that "defendants can view as no less serious a possible penalty of [over six months] in prison when charged with [multiple] offenses . . . than if charged with one offense having a potential penalty of [greater than six months]. . . . Nor . . . should [a] court view the offenses any less seriously." *Coppins*, 953 F.2d at 90 (quoting *United States v. Potvin*, 481 F.2d 380, 382 (10th Cir. 1973)).

We reject the reasoning of these courts. When determining a defendant's rights under the Sixth Amendment, the mere possibility of consecutive sentences exceeding six months' imprisonment is insufficient to trigger a defendant's right to a jury trial. We believe that in reaching the opposite conclusion, the courts discussed above failed to focus on the appropriate objective criteria for determining the seriousness of multiple offenses tried together. The Supreme Court has made clear that courts should look to Congress's determination as to the seriousness of a particular offense. Indeed, the Court has explicitly stated that "[t]he judiciary should not substitute its judgment as to seriousness for that of [the] legislature. . . . " *Blanton*, 489 U.S. at 541. While those courts that have previously addressed the question have focused upon the *defendant's* view as to the seriousness of facing over six months imprisonment for aggregate sentences, the appropriate inquiry is how seriously *Congress* views the offenses in the aggregate.

Congress has not indicated that multiple offenses for which a defendant is prosecuted jointly are necessarily any more serious in their aggregate than the most serious individual offense. Rather, 18 U.S.C. § 3584(a) provides that, except as mandated by court order or statute,

"[m]ultiple terms of imprisonment imposed at the same time run concurrently." Thus, the presumption under § 3584(a) is that multiple offenses prosecuted jointly are no more serious in their aggregate than the most serious single offense of conviction.

Moreover, the question of Lewis's right to a jury trial could have been obviated altogether had the government chosen to simply charge both counts of obstructing the mail in separate informations. While trying Lewis's two offenses separately would have been contrary to judicial economy – an outcome we seek to avoid when possible – Lewis himself admits that under such a circumstance he would not have been entitled to a jury trial. Under § 3584, had Lewis been convicted in separate bench trials, the district court could have sentenced him to two terms of imprisonment to run consecutively, thus still exposing him to as much as a year of imprisonment. The mere fact that the government chose to consolidate the charges provides no greater justification for a jury trial than if the charges were tried separately. As Judge Niemeyer wrote in his dissenting opinion in *Coppins*, "[j]udicial efficiency imposed at no greater risk to the defendant should not change the standard for determining whether the defendant is given a jury trial." *Coppins*, 953 F.2d at 92 (Niemeyer, *J.*, dissenting). We agree.

In addressing the question of aggregate penalties, the Fourth Circuit has held that the Supreme Court's pronouncement in *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974), is determinative of the issue:

> [T]here is no apparent reason why the Court's holding in *Codispoti v. Pennsylvania* that consecutive sentences of imprisonment actually imposed for a series of contempts committed during a single trial should be aggregated for this purpose should not apply also to require aggregation of any maximum sentences authorized by statute where those are determinative of the right.

Coppins, 953 F.2d at 90 (citation omitted). In *Codispoti*, however, the Supreme Court addressed the question of aggregating penalties in the context of contempt charges, which in our view does not bear directly upon the issue at hand.

"In criminal contempt prosecutions, 'where no maximum penalty is authorized, the severity of the penalty actually imposed is the best indication of the seriousness of the particular offense.' " *Blanton*, 489 U.S. at 542 n.6 (quoting *Frank*, 395 U.S. at 149.) Accordingly, the only measure of the seriousness of a particular contemnor's criminal acts is the entirety of the court's sentence – the aggregate of the penalties imposed for each contemptuous act – a matter which is strictly at the court's discretion, *see, e.g., United States v. Local 1804-1, Int'l Longshoremen's Assoc., AFL-CIO*, 44 F.3d 1091, 1095-96 (2d Cir. 1995) (describing limits of court's discretion). Because courts cannot look to Congress's estimation of seriousness in the contempt context, the fact that the Supreme Court mandated aggregation of multiple contempt penalties to determine the sentence actually imposed has no bearing on the issue at hand. While *Codispoti* controls in those circumstances in which no maximum penalty is provided by law, it does not affect the analysis when Congress has provided a specific measure of the seriousness of a particular crime – then, as now,

aggregation of penalties remains an inappropriate basis upon which to determine a defendant's right to a jury trial.

Finally, the government argues that even if the court were to aggregate potential sentences, Lewis was not entitled to a jury trial because the magistrate judge assured Lewis that the trial would result in no greater sentence than six months' imprisonment. While we need not resolve this question, in light of the discussion above it is clear that the government's argument is unavailing. The measure for constitutionally required jury trials is the "seriousness" of any given offense or offenses, which is, in turn, measured principally by the maximum punishment authorized by Congress; therefore, self-imposed limitations on sentencing by the court cannot deprive a defendant of his constitutionally protected right to a jury trial. *But see Bencheck*, 926 F.2d at 1519 ("where the trial judge announced that the sentence, in the event of conviction, would be no more than six months' incarceration . . . no jury was constitutionally required").

CONCLUSION

Because we do not believe that Congress has indicated that petty offenses are more serious in their aggregate than is each petty offense unto itself, we affirm the judgment of the district court.

SUPREME COURT OF THE UNITED STATES

No. 95-6465

Ray A. Lewis,

Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Second Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. In addition to the question presented by the petition, the parties are directed to brief and argue the following question: "Whether a defendant who would otherwise have a constitutional right to a jury trial may be denied that right because the presiding judge has made a pre-trial commitment that the aggregate sentence imposed will not exceed six months?" The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 1, 1996. The brief of the Solicitor General is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 29, 1996. A reply brief, if any, is to be filed pursuant to Rule 25.3. Rule 29.2 does not apply.

January 19, 1996

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(5)

Supreme Court, U.S.
FILED
FEB 27 1996
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No. 95-6465

In The

Supreme Court of the United States

October Term, 1995

RAY A. LEWIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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QUESTIONS PRESENTED

1. Whether a defendant is constitutionally entitled to a jury trial when he is tried on several offenses punishable by six months' imprisonment or less, but the aggregate maximum authorized penalty exceeds six months' imprisonment.

2. Whether a defendant who would otherwise have a constitutional right to a jury trial may be denied that right because the presiding judge has made a pretrial commitment that the aggregate sentence imposed will not exceed six months.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 65 F.3d 252, and appears in the Joint Appendix at J.A. 27. The unpublished opinion of the United States District Court for the Eastern District of New York appears in the Joint Appendix at J.A. 14. No other opinions have been rendered.

JURISDICTIONAL STATEMENT

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article III, § 2

The Trial of all Crimes, except in Cases of Impeachment, shall be by jury; and such Trial shall be held in the State where the said Crimes shall have been committed.

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

18 U.S.C. § 1701

Whoever knowingly and willfully obstructs or retards the passage of the mail, or any carrier or

conveyance carrying the mail, shall be fined under this title or imprisoned not more than six months, or both.

18 U.S.C. § 3584(a)

If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

STATEMENT OF THE CASE

Petitioner Ray A. Lewis, a mail handler, was charged with obstructing the mail on two dates in June of 1993, in violation of 18 U.S.C. § 1701. Each count of the two-count information carried a maximum sentence of six months' imprisonment, and consecutive sentences were authorized pursuant to 18 U.S.C. § 3584(a). Since the aggregate authorized penalty was 12 months' imprisonment, Mr. Lewis sought a jury trial. A United States Magistrate Judge for the Eastern District of New York denied this

request. J.A. 12.[1] The Magistrate Judge stipulated that she would not "sentence Mr. Lewis to more than six months in prison under any circumstances" and tried the case without a jury. J.A. 12.

The trial evidence showed that on June 3, 1993 (Count 1), and June 4, 1993 (Count 2), Mr. Lewis removed money from letters that he took from the mail stream and then discarded the letters. The Magistrate Judge convicted Mr. Lewis of both counts, and sentenced him to concurrent terms of three years' probation.

Mr. Lewis appealed to the United States District Court for the Eastern District of New York, on the ground that the aggregate 12-month penalty entitled him to a jury trial. The district court affirmed the conviction. In a written opinion, the court relied on the dissenting opinion in *United States v. Coppins*, 953 F.2d 86 (4th Cir. 1991), to conclude that "a defendant is entitled to a jury trial only if he faces a maximum sentence greater than six months for any single offense that is charged." J.A. 18. Having found that the jury trial right did not attach in this case, the district court did not rule on the effect of the sentencing stipulation. J.A. 22.

The United States Court of Appeals for the Second Circuit affirmed. The court recognized that those federal courts to consider the question were unanimous in concluding that the aggregate penalty authorized for a defendant's conduct determined whether he was entitled

[1] Page citations preceded by "J.A." refer to the Joint Appendix.

to a jury trial. 65 F.3d at 254. Nevertheless, the court rejected this reasoning and held that "Congress has not indicated that multiple offenses for which a defendant is prosecuted jointly are necessarily any more serious in their aggregate than the most serious individual offense." 65 F.3d at 255. The court supported this assertion by noting that, under 18 U.S.C. § 3584(a) multiple terms of imprisonment imposed simultaneously are presumptively concurrent. The court viewed this as a legislative directive that "multiple offenses prosecuted jointly are no more serious in their aggregate than the most serious single offense of conviction." *Id.*

The court also held that Mr. Lewis was not entitled to a jury trial since "the question of [his] right to a jury trial could have been obviated altogether" had the government chosen to sever the two counts and prosecute them separately. *Id.* Finally, the court noted that the pretrial sentencing stipulation had no effect on the jury trial right. "[S]elf-imposed limitations on sentencing by the court cannot deprive a defendant of his constitutionally protected right to a jury trial." *Id.* at 256.

SUMMARY OF ARGUMENT

I.

Under this Court's decisions interpreting the Sixth Amendment, the jury trial right turns primarily on an objective measure of the seriousness of the defendant's conduct, as reflected by the maximum sentence authorized by the legislature. If the authorized sentence exceeds six months' imprisonment, the offense is "serious,"

and the jury trial right attaches. *Baldwin v. New York*, 399 U.S. 66, 72-73 (1970) (plurality opinion). However, cases that are "petty" under this objective test are still triable by jury if the proscribed conduct was serious at common law. Applying these rules here, Mr. Lewis was entitled to a jury trial. He was tried on two counts of obstruction of the mails, a serious offense at common law. Each count carried a six-month maximum, and consecutive sentences were authorized.

In multiple offense prosecutions the aggregate authorized penalty determines the jury trial right. The plain language of the jury trial provision of the Sixth Amendment attaches the jury trial right to the entire "prosecution," and not to a particular offense. Thus, when the defendant is tried on several offenses in a single prosecution, criminal seriousness for jury trial purposes should be determined by assessing the total authorized penalty, as opposed to the penalty authorized for just one of the offenses charged. If consecutive sentences are authorized, and they aggregate to more than six months' imprisonment, the jury trial right attaches.

The authorized penalty is the most accurate measure of criminal seriousness for Sixth Amendment purposes because it represents the best measure of society's judgment concerning the impact of the defendant's conduct. *Blanton v. City of North Las Vegas*, 489 U.S. 538, 541 (1989). This rationale accordingly mandates an aggregation rule. Society suffers a greater harm from someone who has committed two crimes on two occasions than from someone who has committed one crime on one occasion. Thus, when consecutive sentences are authorized, the aggregate

penalty is a better reflection of society's judgment than is the statutory maximum for any single offense charged.

This conclusion is supported by the Court's decision in *Codispoti v. Pennsylvania*, 418 U.S. 506, 516-17 (1974). In that case, the Court held that, in a criminal contempt prosecution, the aggregation of several petty penalties imposed after a single trial rendered the prosecution serious and required a jury trial. Since the core constitutional principles underlying the right to a jury trial are the same in criminal contempt cases and in statutory offense cases, the aggregation rule of *Codispoti* should apply to statutory offense cases as well.

The Second Circuit's contrary conclusion must be rejected. The court incorrectly viewed 18 U.S.C. § 3584(a), the statute authorizing consecutive sentences in this case, as reflecting a congressional determination that multiple petty offenses "prosecuted jointly are no more serious in their aggregate than the most serious single offense of conviction." *United States v. Lewis*, 65 F.3d 252, 255 (2d Cir. 1995). In fact, Congress's express decision to authorize consecutive sentences flatly contradicts this reasoning. The court below also incorrectly reasoned that, because the prosecutor could have eliminated the need for a jury trial by trying the two counts separately, no jury trial was required. That the counts could have been severed is irrelevant to whether the jury trial right attached to a trial in which the counts were joined.

Alternatively, even assuming that the Court rejects an aggregation rule for statutory offense cases, Mr. Lewis was entitled to a jury trial under the traditional common-law test. The conduct for which he was prosecuted was a

felony at common law, and was punishable by death. Accordingly, the charged offenses were serious for jury trial purposes irrespective of the authorized sentence. *District of Columbia v. Colts*, 282 U.S. 63, 71 (1930); *Callan v. Wilson*, 127 U.S. 540, 556 (1888).

II.

Both in common-law England and colonial America the only offenses triable without a jury were those so designated by the legislature. Courts had no power to extinguish the jury trial right once it had been conferred by the legislature. *Schick v. United States*, 195 U.S. 65, 80 (1904) (Harlan, J., dissenting). Consistent with this tradition, this Court's jury trial cases have uniformly embraced the position that the determination of criminal seriousness is exclusively the domain of the legislature. *Blanton v. City of North Las Vegas*, 489 U.S. at 541-42. It is for this reason that the sentence actually imposed does not determine the jury trial right. *Duncan v. Louisiana*, 391 U.S. 145, 159-60 (1968). It follows from this that a judge's pretrial sentencing stipulation is likewise incapable of extinguishing the jury trial right. If the judge cannot negate the legislative determination of criminal seriousness after the trial, when fully informed of the facts and circumstances of the case, he or she certainly cannot do so before the trial, when the case has not yet been heard. *See Duncan*, 391 U.S. at 159-60; *Blanton*, 489 U.S. at 544.

ARGUMENT

I. MR. LEWIS WAS ENTITLED TO A JURY TRIAL BECAUSE THE CRIMES WITH WHICH HE WAS CHARGED WERE "SERIOUS" WITHIN THE MEANING OF THIS COURT'S DECISIONS INTERPRETING THE SIXTH AMENDMENT.

Petitioner Ray A. Lewis was tried on two counts of obstructing the mail, each of which carried a possible sentence of six months' imprisonment and a fine. Under 18 U.S.C. § 3584(a), which authorized consecutive sentences in this case, the maximum possible penalty was 12 months' imprisonment. Under these circumstances, he was unconstitutionally denied a jury trial. The plain language of the Constitution's jury trial guarantees and this Court's recent jury trial decisions indicate that the jury trial right is contingent on the aggregate penalty a defendant faces. Since the maximum authorized penalty for Mr. Lewis's criminal conduct exceeded six months' imprisonment, a serious criminal sanction, Mr. Lewis was entitled to a jury trial. *Blanton v. City of North Las Vegas*, 489 U.S. 538, 542 (1989); *Baldwin v. New York*, 399 U.S. 66, 72-73 (1970) (plurality opinion); *see also Codispoti v. Pennsylvania*, 418 U.S. 506, 517 (1974). Alternatively, since the common-law crimes closest to Mr. Lewis's conduct were serious felonies, some punishable by death, Mr. Lewis was entitled to a jury trial irrespective of the maximum authorized penalty.

A. The Development of the Petty/Serious Distinction.

Article III, § 2, of the United States Constitution guarantees a jury in the "Trial of all Crimes, except in Cases of Impeachment"; the Sixth Amendment provides for a jury trial in "all criminal prosecutions." Despite the unyielding language of these provisions, this Court has long held that the jury trial guarantee applies only to "serious" prosecutions, and that there is a small category of "petty" cases for which the constitution does not require a trial by jury. *See Callan v. Wilson*, 127 U.S. 540, 557 (1888).

At common law, all criminal cases, without exception, were tried before a jury. Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 Harv. L.R. 917, 923-24 (1926). However, from the sixteenth century on, successive generations of Parliaments enacted laws permitting various types of offenses to be summarily disposed of without a jury, to ease the overcrowding of the courts. *Id.* at 928-33. Although usually petty, the offenses that could be tried summarily were not of any particular class, and indeed in a few rare situations offenses carrying very serious sanctions were exempted from trial by jury. *Id.* For all such offenses, it was the legislature, and not the court, that determined whether an exemption from trial by jury was appropriate. *Id.* at 927.

The American colonists embraced the jury trial right as it had been known at common law. Frankfurter &

Corcoran, *supra*, at 927. In keeping with their common-law antecedents, colonial legal systems prosecuted certain petty offenses summarily, without juries. *Id*. at 938-65 (discussing the relevant statutes of seven of the original colonies). These petty offenses were generally victimless breaches of local standards of morality, such as profanity, drunkenness and breaking the sabbath (*see, e.g., id*. at 944, 950) or other small-scale regulatory offenses (*see, e.g., id*. at 945, 951). *See generally United States v. Barnett*, 376 U.S 681, 749-50 (1964) (Goldberg, J., dissenting). As in England, the jury trial right was extinguishable by the legislature for these categories of offenses, but judges had no power to deny an individual defendant a jury trial in a case where it was authorized. Frankfurter & Corcoran, *supra*, at 965-68.

This Court has long held that the framers intended to incorporate the distinction between petty and serious offenses into the Constitution, and that only serious criminal prosecutions are covered by the Sixth Amendment jury trial guarantee. *Callan v. Wilson*, 127 U.S. at 555. Prior to 1968, when *Duncan v. Louisiana* was decided, the Court looked primarily to the legislative characterization of a particular offense at common law in making this determination.

Callan was the first case in which the Court distinguished between petty and serious offenses for the purposes of the Sixth Amendment jury trial right. In *Callan*, the defendant was convicted of conspiracy at a summary proceeding, and was sentenced to a $25 fine or 30 days in jail. 127 U.S. at 540. The Court acknowledged that there was a class of petty cases that could be constitutionally tried without a jury, but concluded that a conspiracy

prosecution was not one of them because conspiracy was an "infamous crime," and hence indictable by grand jury, at common law. *Id*. at 556. The Court also used a common-law analysis in *District of Columbia v. Colts*, in which the defendant was charged with reckless driving "at a greater rate of speed than twenty-two miles an hour." 282 U.S. 63, 71 (1930) (citation omitted). Without reference to the maximum penalty, the Court found the offense of reckless driving to be serious since it was "an indictable offense at common law." *Id*. at 73.

When this common-law test of seriousness could not easily be applied, or resulted in a determination that the defendant's conduct was petty, the early decisions of this Court also examined the authorized penalty to determine whether a jury trial was required. For example, in *Schick v. United States*, 195 U.S. 65, 67-68 (1904), the Court considered both the moral quality of the charged conduct (since the offense had no common-law equivalent) and the authorized punishment, before finding the offense petty. Similarly, in *District of Columbia v. Clawans*, 300 U.S. 617 (1937), the Court first found the defendant's conduct petty under the common-law test. "Engaging in the business of selling secondhand property without a license was not indictable at common law." *Id*. at 625. The Court went on to consider whether the maximum authorized penalty for the offense – 90 days' imprisonment – was nevertheless "sufficient to bring it within the class of major offenses, for the trial of which a jury may be demanded." *Id*. It concluded that it was not. *Id*. at 625-27.

With the increasing complexity of modern criminal codes, the common-law test has become more difficult to apply. *Blanton*, 489 U.S. at 541 n.5. Moreover, in 1968, the

Court held that the Sixth Amendment jury trial right was applicable in state, as well as federal prosecutions, thus making the right available in the widely disparate judicial systems of the several states. *Duncan*, 391 U.S. at 149. Apparently in light of these developments, the *Duncan* Court followed *Clawans* in resorting primarily to "objective criteria," in particular the maximum authorized penalty, to determine whether a given prosecution was serious, and thus subject to the jury trial requirement. 391 U.S. at 161. The Court held that "the penalty authorized for a particular crime is of major relevance in determining whether it is serious or not and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment." *Id.* at 159 (citing *Clawans*); *see also Blanton*, 489 U.S. at 542. The Court did not abandon the common-law test it had previously applied, but made that test subsidiary to the search for an objective measure of the seriousness of the prosecution – the maximum punishment authorized for the offense. 391 U.S. at 159. Subsequently, in *Baldwin v. New York*, 399 U.S. at 72-73, the Court held that under this objective test any offense punishable by more than six months' imprisonment is serious and must receive a jury trial.

This objective test remains faithful to the constitutional underpinnings of the jury trial right because it embodies the bedrock historical principle that the legislature's determination of criminal seriousness is inviolate. However, criminal conduct that is found to be petty under the objective test must still be analyzed under the common-law test. "Crimes carrying possible penalties up to six months do not require a jury trial if they otherwise

qualify as petty offenses." *Duncan*, 391 U.S. at 159 (citation omitted). Only conduct found to be petty under both tests can be tried without a jury.

B. Mr. Lewis was Entitled to a Jury Trial Under Both the Objective Test and the Common-Law Test.

The maximum authorized penalty for each count with which Mr. Lewis was charged was six months' imprisonment, a penalty that is presumptively petty. *Blanton*, 489 U.S. at 543. However, since 18 U.S.C. § 3584(a) authorized consecutive sentences, the maximum authorized penalty for Mr. Lewis's criminal conduct was 12 months' imprisonment, a serious criminal sanction. *Blanton*, 489 U.S. at 542; *Baldwin*, 399 U.S. at 72-73; *see also Codispoti v. Pennsylvania*, 418 U.S. 506, 517 (1974). Moreover, the common-law crimes closest to Mr. Lewis's conduct were serious felonies, some punishable by death. Accordingly, under both the objective test and the common-law test of criminal seriousness, Mr. Lewis was entitled to a jury trial.

1. The Objective Test.

The plain language of the Sixth Amendment, the rationale for the objective test of criminal seriousness itself, and this Court's jury trial decisions all indicate that the total authorized penalty in a multiple-offense prosecution determines whether a jury trial is constitutionally required.

Historically, this Court's decisions in this area have analyzed cases in which the defendant was tried on a single offense. Thus, although the doctrine exempting from jury trials most offenses carrying a maximum penalty of six months or less has come to be known as the "petty offense" exception, that is so only because in each of the Court's prior cases the parameters of the offense and the prosecution were the same. However, when the defendant is charged with several offenses in a single prosecution, the plain language of the Sixth Amendment requires that the aggregate penalty be the basis for determining whether a jury trial is required.

The Sixth Amendment guarantees a jury trial not for a particular "offense," but rather "[i]n all criminal prosecutions." Since this provision attaches the right to the "prosecution," and not the "offense," by its very terms the jury trial right is contingent on the seriousness of the entire prosecution. The facial meaning of the term "prosecution" was no different at the time of the adoption of the Sixth Amendment than it is now. Then, as now, the term was used to refer to the proceeding in which the accused was brought to trial, and was thus a different, and broader, concept than that of the offense with which he was charged. *See* I William Blackstone, *Commentaries* *268 (describing "prosecutions *for* offences") (emphasis added). It is also clear that the framers would have understood the term "prosecution" to include a trial at which misdemeanors were joined. While at common law the joinder of felonies was disfavored, and the judge could require the prosecution to elect only one to proceed

upon, "this practice ha[d] never been extended to misdemeanors." *Pointer v. United States*, 151 U.S. 396, 402 (1894) (citation and internal quotation marks omitted).

Finally, the other rights enumerated in the Sixth Amendment – speedy trial, public trial, confrontation, compulsory process and counsel – attach to the trial itself, not just to a particular offense. Had the framers intended anything different for the jury trial right they would have said so. They clearly knew how to attach a right to certain "offences." In the Fifth Amendment, they limited the right to be tried on an indictment to certain categories of offenses – "capital, or otherwise infamous crime[s]." Similarly, the Double Jeopardy Clause applies not to all successive prosecutions, but only those involving the "same offence." Had the Sixth Amendment likewise been intended to attach to an individual offense it would have so stated. That it does not provides a strong "negative implication" that the framers did not intend the jury trial right to operate in this way. *Cf. Custis v. United States*, 114 S.Ct. 1732, 1736 (1994) (interpreting 18 U.S.C. § 924(e)).

Accordingly, since the nature of the prosecution determines the jury trial right, it is constitutionally irrelevant that none of the individual offenses in a multi-offense prosecution carries an authorized penalty greater than six months' imprisonment. If the aggregate penalty authorized at a single trial exceeds six months, the defendant is subject to a serious criminal sanction and is entitled to a jury trial; if it does not, then the case can be tried by the judge alone.

An aggregation rule is also consistent with the rationale for the objective test, under which society's judgment is deemed to be best reflected by the maximum authorized penalty. *Blanton*, 489 U.S. at 541. In multiple-offense prosecutions, the relevant societal judgment is embodied in statutes such as 18 U.S.C. § 3584(a), which authorize consecutive sentences. This authorization reflects a legislative determination that the offender's total conduct is as serious as the aggregate penalty authorized for all of the offenses charged.

Indeed, this Court has indicated that statutes such as 18 U.S.C. § 3584(a), which affect the total sentence in the case, are relevant to whether the prosecution is serious. In *Blanton*, the Court noted that "any additional statutory penalties" should be considered in determining criminal seriousness. 489 U.S. at 543. Although *Blanton* referred to the additional penalties authorized for a particular single offense, 18 U.S.C. § 3584(a) authorizes a closely related type of additional penalty – a sentence that is the sum of all the maximum sentences for each charged offense in the prosecution. It is thus an "additional statutory penalty" that attaches to the prosecution as a whole, instead of to a particular offense.

Considering § 3584(a) as an "additional statutory penalty" for jury trial purposes is fully consistent with *Duncan*'s emphasis on the importance of society's assessment of the seriousness of the defendant's transgression. Society is affected by, and hence judges, a defendant's conduct as a whole; it does not break it down into

"offenses."[2] Thus, in multiple-offense prosecutions, society's judgment is not accurately reflected in the statutory maximum for any single offense charged; it is best reflected in the statutory provision providing for consecutive sentences.

Treating the total punishment permitted by statute as the relevant measure of societal judgment for jury trial purposes is also consistent with constitutional principles in related areas. In the Double Jeopardy context, for example, the question whether a defendant has been "twice punished" for Double Jeopardy purposes revolves around the total punishment the legislature has authorized for the defendant's conduct; as long as multiple penalties are permitted by statute, even if applied to the very same conduct, the Double Jeopardy Clause has not been violated. *See Ohio v. Johnson*, 467 U.S. 493, 499 & n.8 (1984); *Whalen v. United States*, 445 U.S. 684, 688-89 (1980); *Brown v. Ohio*, 432 U.S. 161, 165 (1977). Implicit in this doctrine is an understanding that the legislative authorization for "double punishment" is an appropriate reflection of society's norms. Similarly, since the jury trial right turns on society's judgment of all of the defendant's conduct, in a multiple petty offense prosecution, that

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[2] Indeed, the particular offense or offenses with which a defendant is charged is an artificial decision made by a local prosecuting agency. Often this decision takes into consideration a variety of administrative factors, such as court crowding and staffing concerns, that are extraneous to society's judgment of the underlying criminal conduct. *See United States v. Goodwin*, 457 U.S. 368, 382 n.14 (1982) (discussing practical restraints on prosecutors).

judgment is best reflected by the aggregate penalty authorized by the legislature.

In fact, in only a slightly different context, this Court already has adopted an aggregation rule. In *Codispoti v. Pennsylvania*, 418 U.S. at 506, the defendant was convicted at a single non-jury trial of several petty criminal contempts. He received consecutive petty sentences of six months' imprisonment or less on each contempt, for a total of 39 months' imprisonment. *Id.* at 509. This Court reversed on the ground that, in light of the aggregate penalty, the defendant "was tried for what was equivalent to a serious offense and was entitled to a jury trial." *Id.* at 516-17. Under *Codispoti*, the aggregation of multiple petty offenses renders a prosecution serious for jury trial purposes.

Nor is the *Codispoti* rule limited to criminal contempt cases.[3] Although aspects of the jury trial right in contempt cases differ from those in statutory offense cases, the root constitutional principle – serious prosecutions must be tried by a jury – and the six-month cut off point are the same. "[I]n terms of those considerations which make the right to jury trial fundamental in criminal cases, there is no substantial difference between serious contempts and other serious crimes." *Codispoti*, 418 U.S. at

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[3] In fact, the aggregation principle endorsed by *Codispoti* explicitly derives from *Baldwin*. *See Codispoti*, 418 U.S. at 512 & n.4. Moreover, in *Blanton*, both *Baldwin* and *Codispoti* are cited in support of the general principle that "a potential sentence in excess of six months' imprisonment is sufficiently severe to take the offense out of the category of 'petty.' " *Blanton*, 489 U.S. at 543 n.7 (citation omitted).

516 (citations and internal quotation marks omitted).[4] Thus, just as the aggregate penalty turned a multiple petty offense prosecution into a serious one for jury trial purposes in *Codispoti*, so should it in multiple statutory offense prosecutions, such as that faced by Mr. Lewis.

There are two other decisions of this Court that support the view that the jury trial right is determined by the aggregate penalty exposure resulting from the entire prosecution. *Baldwin v. New York* voided a statute eliminating jury trials in all cases brought in the New York City Criminal Court, noting that this statute was unique in the country in "den[ying] an accused the right to interpose between himself and a *possible prison term of over six months*, the commonsense judgment of a jury of his peers." 399 U.S. at 72 (emphasis added) (footnote

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[4] Because criminal contempt traditionally does not carry a statutory maximum set by the legislature, this Court has identified the penalty actually imposed as the most relevant measure of society's judgment of a contemnor's conduct for jury trial purposes. *Bloom v. Illinois*, 391 U.S. 194, 211 (1968). That this Court equates the penalty actually imposed in contempt cases with the authorized maximum in statutory offense cases only bolsters the conclusion that the aggregation rule of *Codispoti* should apply in statutory offense cases. When the judge determines the sentence in a contempt case, he or she is doing nothing more than determining the seriousness of conduct affecting the judicial function. *See Young v. United States ex rel. Vuitton*, 481 U.S. 787, 795-96 (1987). This is the same judgment that legislatures exercise in authorizing penalties for statutory offenses. Thus, if the "legislative" judgment of the judge in a contempt case that consecutive sentences are warranted triggers a jury trial for offenses that would otherwise be petty, so should the identical judgment of the legislature in statutory offense cases.

omitted). *Baldwin* held that a defendant is entitled to a jury trial whenever "what is at stake is the deprivation of individual liberty for a period exceeding six months," regardless of the nature of the individual charges that make up the prosecution. *Id.* Thus, under *Baldwin*, a jury trial can constitutionally be dispensed with only where "the accused *cannot possibly* face more than six months' imprisonment." *Id.* at 73 (emphasis added); *see also Codispoti*, 418 U.S. at 512 n.4 (noting that jury trial required when "term of imprisonment authorized" exceeds six months).

That an aggregation rule is constitutionally required is also suggested by *United States v. Goodwin*, 457 U.S. at 368. There, the defendant was charged with several offenses arising out of a single course of conduct. No single offense carried a penalty in excess of six months' incarceration, but the aggregate authorized penalty was 28 months in prison. 457 U.S. at 387 & n.1 (Brennan, J., dissenting). In analyzing the defendant's due process argument that he was penalized for insisting on a jury trial, this Court assumed that he was constitutionally entitled to a jury trial. *Id.* at 382-83. Indeed, the dissenting opinion specifically noted that the defendant had invoked his "statutory *and constitutional* right to a trial *by jury*." *Id.* at 387 (Brennan, J., dissenting) (emphasis in original).

Consistent with this Court's broad conception of the jury trial right, the overwhelming majority of the lower federal courts to consider the question have concluded that the Constitution requires a jury trial in any multiple-offense trial at which the defendant's aggregate authorized penalty exceeds six months' imprisonment. Three courts of appeal have so held. *United States v. Coppins*, 953

F.2d 86 (4th Cir. 1991); *United States v. Bencheck*, 926 F.2d 1512 (10th Cir. 1991); *Rife v. Godbehere*, 814 F.2d 563 (9th Cir.), *amended by*, 825 F.2d 185 (9th Cir. 1987).[5] Furthermore, four district courts have reached the same conclusion. *United States v. Musgrave*, 695 F.Supp. 231 (W.D. Va. 1988); *United States v. O'Connor*, 660 F.Supp. 955 (N.D. Ga. 1987) (exercising appellate jurisdiction from a decision of a United States Magistrate Judge, pursuant to 18 U.S.C. § 3402); *United States v. Coleman*, 664 F.Supp. 548 (D.D.C. 1985); *United States v. FMC Corp.*, 428 F.Supp. 615 (W.D.N.Y. 1977), *aff'd on other grounds*, 572 F.2d 902 (2d Cir. 1978). Only the lower courts in the instant case and a recent decision of the Eleventh Circuit, *United States v. Brown*, 71 F.3d 845 (11th Cir.), *petition for cert. filed*, (U.S. January 16, 1996) (No. 95-7422) (relying on *Lewis*), have held otherwise.

The reasons advanced by the Second Circuit for rejecting an aggregation rule do not withstand constitutional scrutiny. The court's primary justification was its misreading of 18 U.S.C. § 3584(a). This section states that "[m]ultiple terms of imprisonment imposed at the same time" are presumptively concurrent unless the sentencing judge specifies otherwise. From this, the court of appeals inferred a congressional judgment that "multiple offenses prosecuted jointly are no more serious in their aggregate than the most serious single offense of conviction." 65 F.3d at 255.

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[5] In fact, the Fourth Circuit first so held over 70 years ago. *Coates v. United States*, 290 F. 134 (4th Cir. 1923).

The text of § 3584(a) itself proves the court of appeals wrong. The statute unambiguously authorizes consecutive sentences in multiple-offense prosecutions, a clear manifestation of Congress's judgment that someone who commits two or more crimes is a worse miscreant than someone who commits only one. For jury trial purposes, it is irrelevant that under this section the sentencing court must explicitly order the sentences to run consecutively in a multiple-offense case, just as it is irrelevant that the court must explicitly announce the imposition of a particular sentence in rendering its judgment in a single-offense case. In determining whether a defendant is entitled to a jury trial, the reviewing court must "assume[] that a defendant . . . would receive the *maximum* authorized prison sentence," regardless of what the sentencing court actually says or does. *Blanton*, 489 U.S. at 544 (emphasis in original). Only this method of analysis provides the appropriate measure of the legislature's judgment as to the seriousness of the defendant's conduct.

The Second Circuit also rationalized the denial of a jury trial in this case by observing that the "question of Lewis's right to a jury trial could have been obviated altogether had the government chosen to simply charge both counts of obstructing the mail in separate informations" and tried them separately. 65 F.3d at 255. But that the two counts *could have been* severed has no bearing on the constitutional requirements of a trial at which they were *not* severed. *Cf. Codispoti*, 418 U.S. at 517.[6] That the

[6] Under the court of appeals's reasoning, if taken to its logical extreme, a jury trial could be denied in almost any prosecution, even for a serious felony, as long as the prosecution

government is capable of prosecuting a case as a petty offense does not affect the constitutional analysis of a prosecution that is itself serious. This Court does not make constitutional rules on the assumption that the government will extend itself wherever possible to circumvent the Bill of Rights. Indeed, in *Singer v. United States*, 380 U.S. 24 (1965), this Court declined to hold that the fact that Fed. R. Crim. P. 23(a) would allow the government to withhold its consent to a defendant's waiver of a jury trial for an "ignoble purpose" rendered the rule unconstitutional. *Id.* at 37.

Moreover, contrary to the Second Circuit's expectations, it is unlikely that prosecutors will choose to prosecute otherwise joinable misdemeanors serially. Even assuming that the manipulation of multiple counts solely to avoid a jury trial is not a due process violation (*but see Goodwin*, 457 U.S. at 380 n.11), there is little reason to assume that the government will do so. As the court below pointed out, conducting successive bench trials is "contrary to judicial economy." 65 F.3d at 255. Moreover, by severing joinable counts, the government forfeits the distinct tactical advantage of having the finder of fact hear evidence that the defendant has committed two or more crimes, not just one. In fact, putting aside any tactical considerations, both sides benefit from, and should prefer, a jury trial. *Goodwin*, 457 U.S. at 383 n.18.[7]

represented that it "could have" reduced the charge to a petty offense for which no jury trial would be required, but elected not to do so.

[7] The aggregation question frequently arises in cases in which the multiple charges have arisen from a single

The objective test of criminal seriousness articulated by *Duncan*, *Baldwin*, and *Blanton* looks to the maximum authorized penalty as a reflection of society's judgment concerning the seriousness of a defendant's criminal conduct. In multiple-offense prosecutions for which consecutive sentences are authorized, that judgment is best measured by the aggregate penalty to which the defendant is exposed. Since Mr. Lewis faced an aggregate sentence of 12 months' imprisonment, a serious criminal sanction, he was entitled to a jury trial.

2. The Common-Law Test.

Even if this Court concludes that the Sixth Amendment does not require aggregating the potential penalties at a multiple-offense trial, Mr. Lewis was nevertheless entitled to a jury trial, since the crimes with which he was charged were serious at common law. Although this Court has not applied the common-law test in its recent decisions, that test has never been repudiated.[8] In fact, *Duncan*, the progenitor of the modern objective test,

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transaction. In such cases, it is even less likely that successive prosecutions would be possible. Justice Department policy requires that all charges arising from a single transaction be "alleged and tried together and should not be made the basis of multiple prosecutions." *Petite v. United States*, 361 U.S. 529, 530 (1960) (per curiam) (citation omitted). Moreover, double jeopardy considerations will preclude certain successive prosecutions irrespective of the *Petite* policy. *See Ashe v. Swenson*, 397 U.S. 436 (1970).

[8] *Blanton* describes the Court's cases as "mov[ing] away" from the common-law test of criminal seriousness, but does not reject it. 489 U.S. at 541 n.5.

explicitly incorporates the common-law test as an alternative basis for finding criminal seriousness when the authorized penalty for an offense is six months or less. 391 U.S. at 159. More recently, the Advisory Committee that drafted the 1980 Rules of Procedure for the Trial of Misdemeanors Before United States Magistrates noted the continuing viability of the Common-Law Test.

> [T]he definition of a 'petty offense' in 18 U.S.C. § 1(3), 'any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500 or both,' will usually but not inevitably apply here. The Supreme Court has recognized the historical difference in treatment accorded petty offenses and has excluded them from the requirement that the trial of 'crimes' be by jury. . . . *Nevertheless, certain offenses have traditionally been considered 'crimes' at common law, and are still such even though the maximum penalty currently prescribed by law is not more than six months imprisonment or a fine of $500.* That is, the penalty prescribed is of major relevance in determining whether an offense is petty in the constitutional sense, but is not the sole criterion; the historical antecedents of the offense and the ethical condemnation with which the community views the offense are also important.

1980 Rules of Procedure for the Trial of Misdemeanors Before United States Magistrates (Advisory Committee's Note) (citations omitted) (emphasis added).

Theft from the mails is one of those modern offenses that was clearly serious at common law; such conduct must thus be tried by a jury irrespective of the authorized penalty. *Duncan*, 391 U.S. at 159. On two occasions in June

of 1993, Mr. Lewis allegedly stole money from mail that he handled in the course of his employment as a postal worker. Although he was charged with misdemeanors, at common law the identical conduct was extremely serious. Under a 1766 English statute, a person who stole from the mails was "deemed guilty of felony." 7 Geo.3, ch. 50, § II (Eng.) (repealed 1888). The penalty was "death as a felon, without benefit of clergy." *Id*. A postal employee who destroyed mail, or who failed to turn over monies received as payment for postage, was likewise "deemed guilty of felony," although this particular offense was not a capital crime. *Id*. at § IV.

The colonists took a similarly hostile view of theft from the mails. In 1792, the Second Congress enacted legislation that established a federal post office and post roads. Under this statute, the theft of money or monetary instruments from the mail was also punishable by death. Act of February 20, 1792, ch. 7, § 16, 1 Stat. 232, 236 (expired 1799).

As these statutes demonstrate, at common law, theft from the mails was "an offence of a grave character." *Callan*, 127 U.S. at 556. The mere designation of the conduct as a "felony" rendered it indictable. Under this Court's precedents, therefore, theft from the mails is not a petty offense. *Id*.; *Colts*, 282 U.S. at 73. Accordingly, under the common-law test, Mr. Lewis was charged with serious offenses and was entitled to a jury trial irrespective of the maximum authorized penalty. *Duncan*, 391 U.S. at 159.

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For the foregoing reasons, under both the objective test and the common-law test, Mr. Lewis was entitled to a jury trial.

II. UNDER THE SIXTH AMENDMENT, THE TRIAL JUDGE'S PRETRIAL DECISION NOT TO IMPOSE A SENTENCE IN EXCESS OF SIX MONTHS COULD NOT DEPRIVE MR. LEWIS OF A JURY TRIAL.

The historical and political origins of the jury trial right demonstrate that there is no constitutional basis for allowing the judge to extinguish the right to a jury trial by promising to impose a particular sentence. The right to a jury trial has always been determined by legislative enactment, and not by the ruling of an individual judge. This Court's cases have uniformly respected this rule, and have consistently relied on legislative classifications in determining whether the jury trial right attaches. Thus, since the legislative classification of criminal seriousness cannot be modified by the trial judge (*Blanton v. City of North Las Vegas*, 489 U.S. 538, 541-42 (1989)), the Magistrate Judge's promise not to sentence Mr. Lewis to more than six months in prison did not extinguish his right to a jury trial.

At common law, the offenses that could be tried summarily usually, but not always, carried petty penalties; in a few rare situations, crimes carrying very serious sanctions were exempted from trial by jury. Frankfurter & Corcoran, *supra*, 928-33. The one thing all such offenses had in common, however, was that the authority to try

them without a jury was expressly provided by the legislature. At common law, only a legislative act could extinguish the jury trial right. *Id.* at 927. The judge presiding over a particular case had no independent power to do so. *See Schick v. United States*, 195 U.S. 65, 80 (1904) (Harlan, J., dissenting):

> I am not aware of, nor has there been cited, any case in England in which, after *Magna Charta* and prior to the adoption of our Constitution, a court, tribunal, officer, or commissioner has, without a jury, even in the case of a petty offense, determined the question of crime or no crime, when the defendant pleaded not guilty, *unless the authority to do so was expressly conferred by an act of Parliament.*

Id. (emphasis in original).

Colonial legal systems also prosecuted petty offenses summarily, without juries. *See* Frankfurter & Corcoran, *supra*, at 938-65 (collecting the relevant statutes of seven of the original colonies). As in England, the right was extinguishable by the legislature for these categories of offenses, but judges had no power to deny an individual defendant a jury trial in a case where it was authorized. *Id.* at 965-68. Indeed, so ingrained was this principle that Justice Harlan's dissent in *Schick* went so far as to assert that no court, not even this Court, could deem an offense triable without a jury absent an explicit congressional designation that a jury trial was not required. 195 U.S. at 98-99.

To the framers of the Constitution, the right to trial by jury was more than a procedural right intended to benefit a particular defendant; it was one of the most

cherished structural components of government itself. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L.R. 867, 870-72 (1994). As the Court noted in *Duncan*,

> [t]he guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to a jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.

391 U.S. at 156 (footnotes omitted). The framers viewed the jury trial right as a means of ensuring that the power to deprive a citizen of liberty was not concentrated in the hands of the government. Thus, it would have been inconceivable to them that, in those prosecutions to which it attached, the jury trial right could be unilaterally extinguished by the judge.[9]

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[9] Of course, the jury trial right in serious cases, like the right to counsel in felony cases, can be waived. *See Patton v. United States*, 281 U.S. 276 (1930); *Faretta v. California*, 422 U.S. 806 (1975).

This Court's jury trial cases have consistently embraced the view that the determination of criminal seriousness is one that is indelibly fixed by the legislature. "The judiciary should not substitute its judgment as to seriousness for that of a legislature, which is 'far better equipped to perform the task, and [is] likewise more responsive to changes in attitude and more amenable to the recognition and correction of their misperceptions in this respect.' " *Blanton*, 489 U.S. at 541-42 (citation omitted). Thus, if a particular case is serious, it must be tried by a jury regardless of the trial judge's assessment. A pretrial sentencing stipulation cannot negate the legislative classification of criminal seriousness in the jury trial context any more than it can negate the analogous classification – designation as a felony – when it comes to the right to counsel. *See Gideon v. Wainwright*, 372 U.S. 335 (1963); *Johnson v. Zerbst*, 304 U.S. 458 (1938).[10]

To hold otherwise would be to eviscerate the objective test for criminal seriousness as established by *Duncan* and its progeny. Under that test, the Court always assumes that the defendant will be subject to the maximum sentence authorized by the legislature, regardless of what the trial court actually does (*Blanton*, 489 U.S. at

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[10] While *Scott v. Illinois*, 440 U.S. 367 (1979), permits a pretrial stipulation to extinguish the right to counsel in state court misdemeanor cases, *Gideon* requires counsel in all felony cases. The trial court cannot "convert" a felony into a misdemeanor with a sentencing promise, then deny the defendant an attorney. Similarly, the court cannot "convert" a serious prosecution into a petty one so as to deny the defendant a jury trial.

544), and the actual sentencing consequences to the particular defendant are irrelevant. *Duncan*, 391 U.S at 159-60. A pretrial stipulation, like the actual sentence imposed, does not change the statutory maximum.

Indeed, only one federal court has ever held to the contrary, and its reasoning is seriously flawed. In *United States v. Bencheck*, 926 F.2d 1512 (10th Cir. 1991), the defendant was tried on four offenses, each of which carried a maximum penalty of six months' imprisonment or less; the maximum authorized sentence was more than 18 months' imprisonment. *Id.* at 1514. The trial court refused to grant the defendant a jury trial, but stipulated that should he be convicted the court would not impose a sentence in excess of six months. *Id.* at 1513. On appeal, the Tenth Circuit acknowledged that the defendant was constitutionally entitled to a jury trial in this situation, but held that the pretrial stipulation had extinguished that right. *Id.* at 1520.

The Second Circuit addressed this question below, but reached a different result. In *dicta*, the court refused to follow *Bencheck*; it noted that the government's claim that the pretrial stipulation had effectively extinguished Mr. Lewis's right to a jury trial was "unavailing":

> The measure for constitutionally required jury trials is the 'seriousness' of any given offense or offenses, which is, in turn, measured principally by the maximum punishment authorized by Congress; therefore, self-imposed limitations on sentencing by the court cannot deprive a defendant of his constitutionally protected right to a jury trial.

Lewis, 65 F.3d at 255-56. This Court should likewise reject the reasoning of *Bencheck*.

Bencheck's primary flaw is that it incorrectly assumes that the sentence that the defendant is likely to receive is an adequate reflection of the societal judgment upon which the jury trial right turns. This Court's decisions unambiguously hold that the jury trial right depends on society's judgment of the defendant's conduct, not the trial court's. That is why the sentence actually imposed is irrelevant to the issue. *Duncan*, 391 U.S. at 159-60; *Blanton*, 489 U.S. at 541. If the sentencing court's informed judgment of criminal seriousness, as reflected in the sentence actually imposed, is not an adequate substitute for the societal judgment embodied in the maximum authorized penalty, then clearly the court's uninformed pretrial prediction of criminal seriousness cannot be either.[11]

The aberrational methodology permitted by *Bencheck* thus defies *Duncan* irrespective of the Tenth Circuit's claim that its approach was "objective." 926 F.2d at 1518. While it is true that the jury trial right turns on an examination of objective indicia of criminal seriousness, it is not true that the identification of any objective factor at all will suffice. The Tenth Circuit held that because the

[11] The stipulation in Mr. Lewis's case cannot be seen as a judgment as to criminal seriousness at all. The record indicates the stipulation did not arise out of the Magistrate Judge's reasoned judgment of the circumstances of the case, about which she could have had little foreknowledge, but rather solely out of her belief, however erroneous, that such a promise would render a bench trial constitutional. J.A. 12.

pretrial sentencing stipulation set forth an objective measure of the consequences of the prosecution for that particular defendant, *Duncan* and *Blanton* were satisfied. 926 F.2d at 1518. However "objective" in this context does not simply mean "concrete" – it means "categorical." Any prosecution that meets the definition of "serious" must be tried by a jury (*Blanton*, 489 U.S. at 541), and the right is in no way contingent on the facts of the individual case. Thus the trial court's assessment of the case, even if objectively expressed in a pretrial sentencing stipulation, is irrelevant. The only constitutionally permissible inquiry is whether the case falls within the category of prosecutions designated by the legislature as capable of being tried without a jury.

Bencheck's second fallacy is its reliance on the use of pretrial stipulations to determine the jury trial right in criminal contempt cases. 926 F.2d at 1518-19. In such cases, where there is no statutory maximum fixed by the legislature, the judge's assessment of the contemnor's conduct is the most relevant measure of seriousness for jury trial purposes. *Blanton*, 489 U.S. at 542 n.6; *Bloom v. Illinois*, 391 U.S. 194, 211 (1968). However, this rule operates only in the criminal contempt context and has never been applied to the determination of the constitutional right to a jury trial in statutory offense cases. *Blanton*, 489 U.S. at 542. Other than in the unique situation where the offense is against the court itself and the court alone sets the punishment without any legislative input, the legislature's judgment of criminal seriousness is more accurate than the trial court's. *Duncan*, 391 U.S. at 159. Thus, where the legislature has spoken, its judgment alone determines the jury trial right.

Finally, *Bencheck* erroneously relies on the language of Fed. R. Crim. P. 58(a)(3), which allows for relaxed procedural safeguards in petty offense cases "as to which the court determines that, in the event of conviction, no sentence of imprisonment will be imposed." Rule 58(a)(3) has no applicability here. First, the stipulation in *Bencheck*, as in Mr. Lewis's case, was not that "no" imprisonment would be imposed; it was that no more than six months' imprisonment would be imposed. 926 F.2d at 1513; J.A.12. Moreover, it is clear that the jury trial right is not among those extinguishable by a pretrial stipulation under Rule 58(a)(3). On its face, that provision applies only to the right to counsel (Rule 58(b)(2)(C))[12]

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[12] That Rule 58 does not permit a stipulation to do away with the jury trial right is confirmed by its antecedents. The 1970 Rules for the Trial of Minor Offenses before United States Magistrates made no procedural allowances of any kind for pretrial sentencing stipulations. The superseding 1980 Rules of Procedure for the Trial of Misdemeanors Before United States Magistrates authorized such stipulations, but exempted the jury trial right from those extinguishable by stipulation. Moreover, as the Advisory Committee Notes to the 1980 Rules make clear, those rules were based on the untested assumption that *Scott v. Illinois*, 440 U.S. 367 (1979), under which a pretrial stipulation can extinguish the right to counsel in state court misdemeanor prosecutions, applied in federal court. But this Court has never held that *Scott* applies in federal court, and there is considerable doubt that it does. *Scott* itself indicates that its rule is a concession to the "difficulties" of "incorporation" (440 U.S. at 372) and describes its own holding as relating to the "constitutional right to appointed counsel in state criminal proceedings." *Id.* at 373 (footnote omitted). The lower federal courts are split on the applicability of *Scott* to federal prosecutions. *See, e.g., United States v. Reilley*, 948 F.2d 648 (10th Cir. 1991) (*Scott* applies in federal court); *United States v. Doe*, 743 F.2d 1033 (4th Cir. 1984) (assuming, without analysis, that *Scott* applies in federal court); *United States v. Jackson*, 605 F.2d 1319 (4th Cir. 1979) (same); *United States v. Downin*, 884 F.Supp. 1474 (E.D. Cal. 1995) (*Scott* does not apply in federal court); *United States v. Nash*, 703 F.Supp. 507 (W.D. La.), *aff'd on other grounds*, 886 F.2d 1312 (5th Cir. 1989) (assuming, without analysis, that *Scott* applies in federal court); *United States v. Ramirez*, 555 F.Supp. 736 (E.D. Cal. 1983) (*Scott* does not apply in federal court).

and to the procedures enumerated in Rule 58(c) relating to guilty pleas, waivers of venue, sentencing, and notification of the right to appeal. *See* Rule 58(c)(1)-(4).

In sum, the constitutional history of the jury trial guarantee, this Court's jury trial precedents, and the relevant rules of criminal procedure unanimously point toward a single conclusion: A pretrial sentencing stipulation, while capable of extinguishing certain procedural rights, cannot supersede the legislative determination of criminal seriousness. Accordingly, such a stipulation cannot extinguish the jury trial right.

CONCLUSION

For the foregoing reasons, petitioner prays that the judgment below be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1995

RAY A. LEWIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether a defendant who is prosecuted in a single proceeding for two petty offenses has a constitutional right to a jury trial if the aggregate sentence authorized for the two offenses exceeds six months' imprisonment.

2. Whether a defendant who would otherwise have a constitutional right to a jury trial may be denied that right because the presiding judge has made a pretrial commitment that the aggregate sentence imposed will not exceed six months.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (J.A. 27-34) is reported at 65 F.3d 252. The opinion of the district court (J.A. 14-26) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 5, 1995. The petition for a writ of certiorari was filed on October 20, 1995, and was granted on January 19, 1996 (J.A. 35). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, Section 2, Clause 3 of the Constitution provides in relevant part:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury * * *.

The Sixth Amendment to the Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed * * *.

STATEMENT

After a bench trial held before a magistrate judge in the United States District Court for the Eastern District of New York, petitioner was convicted on two counts of obstructing the mail, in violation of 18 U.S.C. 1701. He was sentenced to three years' probation, ordered to participate in a drug treatment program, and assessed $10. The court of appeals affirmed. J.A. 27-34.

1. Petitioner was a mail handler for the United States Postal Service. On June 3, 1992, postal inspectors saw him rip open several pieces of mail and place the contents in his pocket. The next day, the postal inspectors routed "test" mail (containing marked currency) through petitioner's work station. The inspectors saw petitioner open the test mail and remove the currency. They arrested petitioner as he was removing currency from yet another letter. C.A. App. 9, 65.

2. Petitioner was charged with two counts of obstructing the mail, in violation of 18 U.S.C. 1701.

J.A. 14, 28. Each count carried a maximum authorized prison sentence of six months.[1] Petitioner requested a jury, but the magistrate judge granted the government's motion for a bench trial. J.A. 12. The magistrate judge reasoned that, because she would not "under any circumstances" sentence petitioner to a total of more than six months' imprisonment, petitioner was not entitled to a jury. J.A. 12, 15, 28. After a one-day trial, petitioner was found guilty on both counts. J.A. 1, 14.

The district court affirmed petitioner's conviction. J.A. 14-26. It rejected petitioner's argument that "the possibility of receiving a [cumulative] sentence in excess of six months, in effect, transformed the two petty offenses into a serious offense, thereby guaranteeing him the constitutional right to a jury trial." J.A. 17. Relying on this Court's decisions in *Baldwin* v. *New York*, 399 U.S. 66 (1970), and *Blanton* v. *City of North Las Vegas*, 489 U.S. 538 (1989), the district court concluded that the right to a jury trial on a criminal charge depends on the severity of the potential sentence for that particular charge, not the seri-

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[1] Section 1701 provides:

> Whoever knowingly and willfully obstructs or retards the passage of the mail, or any carrier or conveyance carrying the mail, shall be fined under this title or imprisoned not more than six months, or both.

Under 18 U.S.C. 19, "the term 'petty offense' means a Class B misdemeanor, a Class C misdemeanor, or an infraction, for which the maximum fine is no greater than the amount set forth for such an offense in section 3571(b)(6) or (7) in the case of an individual." The classification system for federal offenses is set forth in 18 U.S.C. 3559(a). Under that system, Section 1701 is a Class B misdemeanor, 18 U.S.C. 3559(a)(7), and hence a federal petty offense.

ousness of the defendant's overall conduct as measured by the potential aggregate penalty on all of the charges brought in a particular proceeding. J.A. 17-18, 22.[2]

3. The court of appeals affirmed. J.A. 27-34. It too rejected the claim that "potential sentences must be aggregated to determine the right to a jury trial." J.A. 30. The court concluded that consideration of sentences in the aggregate "fail[s] to focus on the appropriate objective criteria." J.A. 31. The appropriate focus, it explained, is not on "the *defendant's* view as to the seriousness of facing over six months imprisonment for aggregate sentences," but rather on "how seriously *Congress* views the offenses in the aggregate." *Ibid.* The court observed that, under 18 U.S.C. 3584(a), absent a contrary court order or statute, "[m]ultiple terms of imprisonment imposed at the same time run concurrently." J.A. 32. The court believed that that indicated a congressional presumption "that multiple offenses prosecuted jointly are no more serious in their aggregate than the most serious single offense of conviction." *Ibid.* The court also saw little reason to view petitioner's jointly tried petty offenses in the aggregate, since petitioner's claimed "right to a jury trial could have been obviated altogether had the government chosen to simply charge both counts * * * in separate informations." *Ibid.*

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[2] The district court also rejected petitioner's claim that the magistrate judge's authority, under 18 U.S.C. 3563(b)(6), to order petitioner to give up his job as a postal worker as a condition of probation was an "additional statutory penalty" that rendered his offenses serious and entitled him to a jury trial. J.A. 22-25. Petitioner has not pursued that argument further.

After concluding that petitioner had no right to a jury trial on his two petty offenses, the court addressed (in dictum) the government's alternative argument that, even if aggregation of the potential sentences for the two offenses were appropriate, petitioner would still have no entitlement to a jury, because the magistrate judge announced before the trial that petitioner would receive no more than a six-month sentence. J.A. 34. The panel suggested that, because the seriousness of an offense is "measured principally by the maximum punishment authorized by Congress," a trial judge's "self-imposed limitations on sentencing" should not "deprive a defendant of his constitutionally protected right to a jury trial." *Ibid.*

SUMMARY OF ARGUMENT

This Court has long held that the Constitution's jury trial guarantee in criminal cases does not extend to petty offenses, *i.e.*, those offenses that, based on objective indications, are regarded by the legislature as relatively less serious. The seriousness of an offense is gauged by the penalty that the legislature provides for a violation. An offense that carries more than six months' imprisonment is a serious offense, to which the right to a jury trial attaches; an offense that carries no more than six months' imprisonment is presumptively petty.

The character of an offense as petty does not change when a charged violation is joined with other petty offense charges. Nor does a right to a jury trial on the petty offense charge spring into being simply because the aggregate penalty for several petty offenses may total more than six months' imprisonment. The reason for rejecting any such aggregation

principle, and for adhering to this Court's consistent offense-based analysis, flows from the basic logic of the petty offense rule. At common law, petty offenses, as a class, were triable to justices of the peace in summary proceedings without juries. That common law history directly led to this Court's conclusion that the constitutional jury trial right has no application to petty offenses. By the same token, the common law affords no support for the suggestion that a person charged with two petty offenses, each triable without a jury, acquires a right to a jury if the cases are tried jointly.

The Sixth Amendment does not alter the focus of the common law—and the Constitution—on whether a particular offense is petty or serious in character. While the Sixth Amendment's jury trial right applies to "criminal prosecutions," it, like the jury trial clause in Article III, reflects the Framers' intention to preserve the common law's treatment of petty offenses as matters not implicating the right to a jury trial. If a single petty offense is not a "criminal prosecution" within the meaning of the Sixth Amendment, there is no valid basis for holding that multiple petty offenses that are joined together somehow become one.

Nor is there a basis for expanding the jury trial right to multiple petty offenses on the ground that a cumulative potential sentence of more than six months' imprisonment is intrinsically serious. This Court has never based its petty offense rule on a subjective view of seriousness, but has instead looked to the common law antecedents of the constitutional jury trial right and to the legislature's determinations of penalties. Similarly, the test is not whether society at large judges a person more harshly if he is

convicted of several offenses. The touchstone in this area is the judgment of the legislature, and legislatures do not, and cannot, assess in advance the potential seriousness of future prosecutions that combine multiple offenses. In any event, an aggregation rule would produce inconsistent results, since it would tie the jury trial right to the prosecutor's decision to join several offenses, or to the court's decision to sever them.

This Court's holdings in the contempt field provide no basis for a general rule requiring aggregation. The Court has ruled that, where a legislature has not specified the penalty that may be imposed for contempt, the actual sentence imposed is the proper measure of "seriousness" for determining the applicability of the jury trial right. The Court has also ruled that when contempts arising from a single trial are adjudicated in post-trial proceedings, the aggregate sentence must be used to assess seriousness. Those rules, which respond to the unique context of contempts where there is no legislative determination of seriousness, have no application to offenses that are, by virtue of the authorized sentences attached, "petty" in the usual sense of the term.

Finally, if this Court were to base the jury trial right on the aggregate penalties that a defendant faces in a single prosecution for multiple petty offenses, it should also hold that no jury trial right exists when the judge makes a pretrial commitment not to impose a sentence of more than six months' imprisonment for the multiple petty offenses. If the seriousness of the prosecution is to be gauged by the potential penalty to be imposed, rather than the legislature's assessment of the seriousness of each offense, a commitment by the judge to limit the

sentence to six months or less makes clear that the ultimate penalty faced by a defendant is not "serious" within the meaning of the Constitution's jury trial guarantee.

ARGUMENT

I. A PETTY OFFENSE IS NOT TRANSFORMED INTO A SERIOUS OFFENSE, REQUIRING A TRIAL BY JURY, BY VIRTUE OF ITS JOINDER WITH OTHER PETTY OFFENSES

"It has long been settled that 'there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision.'" *Blanton* v. *City of North Las Vegas*, 489 U.S. 538, 541 (1989) (quoting *Duncan* v. *Louisiana*, 391 U.S. 145, 159 (1968)); accord *Baldwin* v. *New York*, 399 U.S. 66, 68 (1970) (plurality opinion); *Bloom* v. *Illinois*, 391 U.S. 194, 210 (1968); *District of Columbia* v. *Clawans*, 300 U.S. 617, 624 (1937); *Schick* v. *United States*, 195 U.S. 65, 70 (1904); *Lawton* v. *Steele*, 152 U.S. 133, 141-142 (1894); *Callan* v. *Wilson*, 127 U.S. 540 (1888). "In determining whether a particular offense should be categorized as 'petty,'" this Court has focused on "objective indications of the seriousness with which society regards the offense." *Frank* v. *United States*, 395 U.S. 147, 148 (1969). The most relevant objective indication is "the severity of the penalty authorized," *ibid.*, because, "[i]n fixing the maximum penalty for a crime, the legislature 'include[s] within the definition of the crime itself a judgment about the seriousness of the offense.'" *Blanton*, 489 U.S. at 541. In that regard, the Court has concluded that "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is

authorized," *Baldwin*, 399 U.S. at 69 (plurality opinion), and, conversely, that "an offense carrying a maximum prison term of six months or less" presumably is petty, *Blanton*, 489 U.S. at 543. This Court's reliance on the nature of the offense charged, by reference to the sentence it carries, as the gauge of the constitutional right to jury trial remains the proper test, regardless of whether a defendant is charged with only one offense, or with several petty offenses joined together for trial in a single prosecution.[3]

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[3] The Second Circuit's holding in this case that the jury trial right turns on the penalty imposed for that offense, rather than the aggregate punishment that may be imposed for several joined offenses, accords with the holding in *United States* v. *Brown*, 71 F.3d 845, 847 (11th Cir. 1996) ("the 'aggregation' of penalties for multiple petty offenses does not mandate a jury trial"), petition for cert. pending, No. 95-7422. Three courts of appeals have looked to the aggregate penalty imposed in deciding whether a jury trial right attaches to multiple joined petty offenses, but those courts have also held either that a jury trial right does not attach if the magistrate commits before trial not to impose a sentence of more than six months' imprisonment, see *United States* v. *Bencheck*, 926 F.2d 1512, 1518 (10th Cir. 1991), or that a violation of the right to a jury trial can be remedied by imposing a sentence not exceeding six months' imprisonment, see *Rife* v. *Godbehere*, 814 F.2d 563, 565, amended, 825 F.2d 185 (9th Cir. 1987), or that the question whether a jury trial right can be extinguished by a presiding judge's pretrial stipulation to sentence a defendant to no more than six months' imprisonment remains an open one, see *United States* v. *Coppins*, 953 F.2d 86, 90 n.2 (4th Cir. 1991).

A. The Nature Of The Offense Charged Governs The Right To A Jury Trial

This Court has consistently analyzed a defendant's right to trial by jury by specific reference to the character of the offense charged. See, *e.g.*, *Callan*, 127 U.S. at 552 ("[T]here are certain *minor or petty offences* that may be proceeded against summarily.") (emphasis added); *Schick*, 195 U.S. at 68 ("[T]he nature of *the offense*, and the amount of punishment prescribed * * * determine whether *it* is to be classed among *serious or petty offenses*.") (emphasis added); *District of Columbia* v. *Colts*, 282 U.S. 63, 73 (1930) ("Whether *a given offense* is to be classed * * * as *a petty offense* * * * depends primarily upon the nature of *the offense*.") (emphasis added); *Clawans*, 300 U.S. at 630 ("We cannot say that this penalty, when attached to *the offense* of selling second-hand goods without a license, gives *it* the character of *a common law crime* or of *a major offense*.") (emphasis added); *Frank*, 395 U.S. at 149 ("[T]he legislature has included within the definition of *the crime itself* a judgment about the seriousness of *the offense*.") (emphasis added); *Duncan*, 391 U.S. at 159 ("[T]he penalty authorized for *a particular crime* is of major relevance in determining whether *it* is serious.") (emphasis added); *Baldwin*, 399 U.S. at 72-73 (plurality opinion) (referencing line "between *offenses* that are and that are not regarded as 'serious' ") (emphasis added); *Blanton*, 489 U.S. at 543 (question is whether the penalty "reflect[s] a legislative determination that *the offense in question* is a 'serious' one") (emphasis added); *United States* v. *Nachtigal*, 507 U.S. 1, 4 (1993) (per curiam) ("[T]he statutory penalties in other States are irrelevant to

the question whether a particular legislature deemed *a particular offense* 'serious.' ") (emphasis added).

Petitioner argues that this Court's long-standing and consistent focus on "the offense," rather than the prosecution as a whole, reflects only that "in each of the Court's prior cases the parameters of the offense and the prosecution were the same." Br. 14. He maintains that "the prosecution" is the correct level of inquiry, and that where, as here, a single case involves multiple petty offenses, the right to a jury trial is "contingent on the seriousness of the entire prosecution." *Ibid.* Contrary to petitioner's view, the Court's offense-specific focus in defining the constitutional right to a jury reflects the historical fact that, at common law, petty offenses, as a class, were triable without juries.

1. Starting in the sixteenth century, successive Parliaments enacted statutes creating numerous "petty" offenses for which a defendant could be convicted summarily by a justice of the peace. See Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 Harv. L. Rev. 917, 926-934 (1926). A typical statute of that period would define an offense or class of offenses and vest jurisdiction for all trials of such offense or offenses in justices of the peace. *Id.* at 927; 1 Richard Burn, *Justice of the Peace* 962 (29th ed. 1845) ("The penal statute frequently points out before whom the conviction is to take place."). Parliament thereby effected "a specific withdrawal from trial by jury of specific offenses in specific statutes, rather than a general formula for summary procedure."

Frankfurter & Corcoran, 39 Harv. L. Rev. at 927.[4] The offenses prosecuted before justices of the peace at common law were many and varied, including "[v]iolations of the laws relating to liquor, trade and manufacture, labor, smuggling, traffick on the highway, the Sabbath, 'cheats,' gambling, swearing, small thefts, assaults, [and] offenses to property." *Id.* at 928 (footnotes omitted); see, *e.g.*, *id.* at 928-929 nn.37-51, 930-933 nn.59-81 (citing statutes). Parliament prescribed monetary penalties for some petty offenses, *id.* at 930-931, and corporal punishment or imprisonment for others, *id.* at 932.

The colonists "brought with them the legal traditions of James I, of which summary jurisdiction by justices of the peace was a familiar part." Frankfurter & Corcoran, 39 Harv. L. Rev. at 934-935. Although practices varied among the colonies, and the colonists apparently "entrusted fewer matters to

[4] Although the statutes vesting jurisdiction over petty crimes in justices of the peace did not eliminate the use of juries in so many words, it is undisputed that offenses triable before justices of the peace were subject to conviction without a jury. "Authority given to the justices meant 'the justices' and not 'the justices and jury.'" Frankfurter & Corcoran, 39 Harv. L. Rev. at 929-930; see also 5 William Blackstone, *Commentaries* 280 (1803) ("[T]here is no intervention of a jury, but the party accused is acquitted or condemned by the suffrage of such person only, as the statute has appointed for his judge."); 1 Burn, *supra*, at 958 ("Under this title will be considered only those convictions which take place before magistrates in a summary way, and without the intervention of a jury."). In some cases, the trial of a petty offense required more than one justice of the peace, although the distribution of offenses that required two justices and those that required only one varied over time, apparently with no definite or consistent plan. Frankfurter & Corcoran, 39 Harv. L. Rev. at 927 n.33.

justices than did the contemporary English law," *id.* at 936, they similarly "acted on the conviction that the much-cherished jury procedure was not imperative for small offenses," *id.* at 937. As Frankfurter and Corcoran summarized, "drastically limited does the right of trial by jury seem to have been known to Englishmen for two centuries preceding the separation of the colonies. Alongside of trial before the popular tribunal was trial by magistrates. There were crimes and crimes. The great dividing line was the use of a jury." *Id.* at 933; accord *Clawans*, 300 U.S. at 624 ("At the time of the adoption of the Constitution there were numerous offenses, commonly described as 'petty,' which were tried summarily without a jury, by justices of the peace in England, and by police magistrates or corresponding judicial officers in the Colonies, and punished by commitment to jail, a workhouse, or a house of correction."); see also, *e.g.*, *Murphy* v. *People*, 2 Cow. 815, 819 (N.Y. Sup. Ct. 1824) (observing that Courts of Special Sessions were established in 1744 to hear certain petty offenses, and that, historically, "[n]o right of trial by jury ever existed in those Courts") (citation omitted).

In the absence of any "substantial evidence that the Framers intended to depart from" common law practice, *Duncan*, 391 U.S. at 160, this Court interpreted the constitutional right to a jury to be roughly coextensive with the right as it existed at common law, "the principles and history of which were familiarly known to the framers of the Constitution,"

Schick, 195 U.S. at 69.[5] This Court interpreted the drafting history of the third clause of Section 2, Article III, in light of the contemporary recognition that juries were unavailable for petty offenses at common law. The initial draft of the clause would have provided the right to a jury for "the trial of all *criminal offenses*," but that language was modified to "the trial of all *crimes*," a term that denoted (in then-common usage) "offenses as [we]re of a deeper and more atrocious dye" than "'misdemeanors' only." *Schick*, 195 U.S. at 69-70 (quoting 4 William Blackstone, *Commentaries* 5). This Court concluded, "in the light of the popular understanding" at the time of the Convention "of the meaning of the word 'crimes,'" that the final draft reflected the Framers' "intent * * * to exclude from the constitutional requirement of a jury the trial of petty criminal offenses." *Schick*, 195 U.S. at 70.[6]

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[5] "The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the Convention who submitted it to the ratification of the Conventions of the thirteen States, were born and brought up in the atmosphere of the common law, and thought and spoke in its vocabulary. They were familiar with other forms of government, recent and ancient, and indicated in their discussions earnest study and consideration of many of them, but when they came to put their conclusions into the form of fundamental law in a compact draft, they expressed them in terms of the common law, confident that they could be shortly and easily understood." *Ex parte Grossman*, 267 U.S. 87, 108-109 (1925).

[6] Accord *Callan*, 127 U.S. at 549 ("The word 'crime,' in its more extended sense, comprehends every violation of public law; in a limited sense, it embraces offences of a serious or atrocious character. In our opinion, the provision is to be interpreted in the light of the principles which, at common law, determined whether the accused, in a given class of cases, was entitled to be tried by a jury.").

2. The common law did not accord a jury trial to a defendant who was simultaneously charged with multiple petty offenses, so long as each was independently triable without a jury. Since jurisdiction for the trial of petty offenses was vested in justices of the peace, a petty offense would not have been tried before a jury regardless of its joinder with another petty offense. See 1 Burn, *supra*, at 963 (noting the absence of "objection to the joining and stating of several [petty] offences, in a distinct manner, in the same information and conviction"); see also *id.* at 984 ("The defendant may be convicted in the same conviction in several penalties for several offences."); accord *Paley's Law and Practice of Summary Convictions* 269 (Walter MacNamara ed., 6th ed. 1879) ("There seems * * * to have been no objection to including in one conviction several distinct offences and penalties of the same kind."); see, *e.g.*, *The Queen* v. *Mathews*, 88 Eng. Rep. 609 (Ch. 1710); *The King* v. *Swallow*, 101 Eng. Rep. 1392 (K.B. 1799).[7]

Colonial statutes also ordinarily defined offenses or classes of offenses and vested jurisdiction over all prosecutions of such offenses in magistrates or

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[7] To the extent that any controversy existed over whether single judgments of convictions could include several offenses, the issue was the proper form of a conviction, not the authority of a justice of the peace to try multiple petty offenses in a single proceeding. See *Paley's Law and Practice of Summary Convictions*, *supra*, at 339.

justices of the peace.[8] Some colonies instead empowered judicial officers to try all offenses that carried penalties below a prescribed maximum. See, *e.g.*, *Charters & General Laws of the Colony & Province of Massachusetts Bay* 68 (1814) (statute adopted in 1651 authorizing trial of misdemeanors by commissioners in Boston, "provided the fines imposed by them, do not exceed forty shillings for one offence"); 2 *Statutes at Large of Pennsylvania from 1682 to 1801*, at 19 (1896) (statute passed in 1700 providing that, in a trial for a petty offense, "where the fine doth not exceed twenty shillings, one or more justices of the peace, upon due proof of the offense, or being committed in his or their presence, may determine and give judgment"). We are not aware of any colonial statute, however, that conditioned the right to a jury

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[8] A typical statute of the times, passed in 1771 (see 5 *Colonial Laws of New York* 237 (1894)), provided as follows:

> [A]ny Person or Persons [who] shall wilfully break any Glass Window or Windows, Porch or Porches, Knocker or Knockers, * * * and being thereof convicted before one or more Justice or Justices of the Peace * * * either by the Confession of the Party or Parties so offending, or the Oath of one or more Credible Witness or Witnesses (which Oath the said Justice or Justices of the Peace is and are hereby impowered and required to administer) shall for every such Offence as aforesaid forfeit the Sum of ten Pounds.

If the offender failed to pay, "every such Justice or Justices of the Peace [was] impowered and required * * * to commit * * * such Person * * * to the Common Goal [*sic*] * * *, there to remain without Bail * * * for the space of one Month unless such Forfeiture or Forfeitures be sooner paid." *Id.* at 238. See also Frankfurter & Corcoran, 39 Harv. L. Rev. at 983-1019 (citing numerous colonial statutes vesting jurisdiction over petty crimes in magistrates or justices of the peace).

trial in a case involving multiple offenses on the potential cumulative penalty for the entire prosecution.

3. Petitioner does not dispute the common law's focus on the seriousness of distinct offenses. Instead, he argues (Br. 14-15) that, because the Sixth Amendment right to a jury trial applies in "criminal prosecutions," the existence of that right depends on the nature of the prosecution as a whole. That is incorrect. Although the Sixth Amendment uses the phrase "criminal prosecutions," in lieu of Article III's reference to "crimes," this Court rejected long ago the notion that "the amendment was intended to supplant that part of the third article which relates to trial by jury." *Callan*, 127 U.S. at 549. The Sixth Amendment merely "enumerates the elements of 'trial by jury' in Article III; it does not extend the field of its operation." Frankfurter & Corcoran, 39 Harv. L. Rev. at 971. In light of the origins of the Sixth Amendment, "it is clear that the scope of trial by jury guaranteed by the Sixth Amendment is identical with the scope of jury trial in Article III. Evidence is wholly lacking of a desire for change." *Ibid.*

Even if it could be said that the right to a jury trial attaches to "criminal prosecutions," rather than to prosecutions for "crimes," that would not, in any event, justify extending the right of trial by jury to prosecutions involving solely petty offenses. Petitioner does not contend that the Sixth Amendment guarantees the right to a jury trial in all criminal prosecutions. Rather, he concedes (Br. 9-13) that a single petty offense may be tried without a jury and thus implicitly acknowledges that the prosecution of a single petty offense is not a "criminal prosecution[]" within the meaning of the Sixth Amendment.

If one charge of a petty offense is not a "criminal prosecution," nothing in the language of the Sixth Amendment supports the view that the joinder of several petty offenses in a single case transforms the whole into a "criminal prosecution" within the meaning of the jury trial right.

4. Although this Court has, over time, modified its approach to determining whether a particular offense carries the right of jury trial, the Court has always maintained its focus on the character of the offense charged. Initially, in *Callan*, the Court defined as "petty or minor" those offenses that were "not of the class or grade triable at common law by a jury." 127 U.S. at 555. Determining the common law character of an offense was impracticable in many cases, however, because of "the substantial number of statutory offenses lacking common law antecedents." *Blanton*, 489 U.S. at 541 n.5. When there was no common law analogue, the Court initially looked primarily to whether the charged offense was by "nature" comparable with common law crimes. See *Schick*, 195 U.S. at 68; *Colts*, 282 U.S. at 73. Under that approach, the Court considered the "moral quality" of an offense, defining as petty those offenses "not * * * necessarily involving any moral delinquency," *Schick*, 195 U.S. at 67, and as serious those "act[s] of such obvious depravity that to characterize [them] as * * * petty offense[s] would be to shock the general moral sense," *Colts*, 282 U.S. at 73.

In 1937, the Court repudiated the view that seriousness is inherent in the nature of an offense. *Clawans*, 300 U.S. at 625. Recognizing that attempts to identify the nature of an offense invited "recourse of the judge to his own sympathy and emotions," the Court directed inquiry instead to "the laws and practices of

the community" as a gauge of the locality's "social and ethical judgments." *Id.* at 628. Invoking a mode of analysis earlier suggested in *Schick*, 195 U.S. at 68, the Court concluded that the maximum authorized penalty was the best "objective indication[] of the seriousness with which society regard[ed] the offense," *Frank*, 395 U.S. at 148.

In 1968, the Court held that the entitlement to a jury in criminal trials is a fundamental right guaranteed by the Fourteenth Amendment. *Duncan*, 391 U.S. at 149. Application of the right to state criminal trials brought into play a vastly expanded range of offenses, *Scott* v. *Illinois*, 440 U.S. 367, 372 (1979), which exacerbated the difficulty of identifying common law equivalents. Recognizing that difficulty, the Court clarified that the key factor in characterizing an offense is the maximum authorized penalty. In *Baldwin*, a plurality of the Court concluded that "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized," 399 U.S. at 69; in *Blanton*, it adopted the converse presumption, *i.e.*, that "an offense carrying a maximum prison term of six months or less" is a petty offense, 489 U.S. at 543. The latter presumption is rebuttable only upon a showing by the defendant "that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one." *Ibid.*

This Court's adoption of a quantitative measure of the seriousness of an offense does not entail the proposition that the constitutional measure of seriousness turns on the aggregation of penalties

available for jointly tried petty offenses.[9] The focus of the Court's inquiry is, and has always been, on the character of the particular offenses with which defendants have been charged. That is a logical corollary of the textual justification for nonjury trials in petty offense cases. The petty offense rule rests on the conclusion that the Constitution, as the common law before it, reserves the jury trial right for prosecutions for serious offenses. Just as the common law did not define the petty offense jurisdiction of justices of the peace by reference to the cumulative penalties at issue in a case, the Constitution does not base the jury trial right on the sum of the potential terms of imprisonment authorized for distinct but jointly tried petty offenses.[10]

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[9] Petitioner errs in suggesting (Br. 20) that *United States* v. *Goodwin*, 457 U.S. 368 (1982), supports a constitutionally required aggregation rule. In that case, the Court rejected a claim that a prosecutor's decision to recharge a more serious offense after the respondent demanded a jury trial on less serious charges raised a presumption of prosecutorial vindictiveness. The Court did not address whether the defendant in that case in fact had the right to a jury trial on the basis of the multiple offenses originally charged.

[10] Petitioner argues (Br. 24-26), for the first time in this case, that he has the right to a jury trial because his conduct—stealing from the mails—was chargeable as a felony in England and in the colonies and punishable by death. In our view, *Blanton* ruled out consideration of how an offense was viewed at common law. See *Blanton*, 489 U.S. at 543 (presumption that crime with six-month sentence is petty is rebuttable "only" by a showing that the total authorized penalty is serious); *Nachtigal*, 507 U.S. at 4 (same). In any event, that issue is not properly before this Court. Petitioner argued in the courts below and in his petition for a writ of certiorari that he merited a jury trial because the cumulative maximum authorized penalties for his petty offenses exceeded six months. He did not claim (or so much as suggest in his petition) that he believed that the individual offenses were not petty because charges of stealing from the mails were triable by jury at common law. That new-found claim is not fairly included in the question presented, and it is therefore beyond the scope of this case. (Whether theft from the mails was *chargeable* as a felony at common law would not, in any event, be the relevant question. Irrespective of the conduct in which petitioner was actually engaged, the question would be whether the offense with which he was charged—obstruction of the mails—was triable by jury at common law. Petitioner cites no evidence that it was.)

B. The Right To A Jury Trial Does Not Depend On The Conduct Involved In A Prosecution For Multiple Petty Offenses

Petitioner claims that the right to trial by jury must extend to proceedings involving multiple petty crimes because (i) no defendant should face the possibility of more than six months' imprisonment without being afforded the right to a jury (Br. 19-21); and (ii) "[s]ociety is affected by, and hence judges, a defendant's conduct as a whole" (Br. 16). Those considerations are not relevant to the constitutional test.

The limitation of the jury right to serious offenses does not stem from this Court's normative view that the jury, rather than a judge, is the appropriate decisionmaker when severe penalties may be imposed in a criminal case.[11] Rather, it stems from the Court's interpretation of the text of the Constitution.

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[11] This Court's reference in *Duncan* to "the right of jury trial in serious criminal cases," 391 U.S. at 156, and the plurality's statements in *Baldwin* to the effect that an accused has the right to interpose a jury "between himself and a possible prison term of over six months," 399 U.S. at 72, have no fair import beyond the context of those cases, *i.e.*, prosecutions for a single charged offense.

That interpretation rests on the Framers' grounding in a common law system that did not provide a jury trial for the prosecution of crimes that the legislature viewed as petty—a judgment that did not change simply because an offender may have committed many petty offenses.

Nor does the likelihood that society will judge a person based on the totality of his conduct dictate that the right to a jury trial be analyzed on that level of generality. The right to a jury turns on the legislature's assessment of the seriousness of particular offenses, not on the imprecise contours of a defendant's "conduct as a whole." A legislature calibrates the seriousness of an offense by authorizing the range of penalties that the offense carries. Legislatures do not assess the seriousness of entire prosecutions.[12]

Although we do not believe that the presumption in 18 U.S.C. 3584(a) that sentences run concurrently

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[12] Nor, ordinarily, do legislatures determine the seriousness of particular combinations of offenses. Legislatures of course may, and sometimes do, authorize the aggregation of petty offenses committed in tandem to create a single serious offense. Section 22-3802 of the D.C. Code (1989), for example, provides that "[a]mounts received pursuant to a single scheme or systematic course of conduct in violation of § 22-3811 (Theft), 22-3821 (Fraud), or 22-3823 (Credit Card Fraud) may be aggregated in determining the grade of the offense and the sentence for the offense." Two second-degree thefts involving the property of separate members of the same household could be aggregated under that statute to meet the threshold amount for a first-degree theft. Where such a first-degree theft is charged, the enhanced penalty authorized by Section 22-3802 is an "objective indication," *Blanton*, 489 U.S. at 541, that the legislature views the multiple, related petty offenses as constituting a single serious offense.

(unless the judge otherwise orders or a statute otherwise requires) reflects a congressional belief that the commission of two offenses is no more serious than the commission of a single offense,[13] petitioner errs in suggesting that Section 3584(a)'s authorization of consecutive sentences reflects a congressional belief that the commission of two offenses in tandem warrants cumulative punishment. Congress judges seriousness offense-by-offense. It cannot assess the seriousness of all potential combinations of offenses, and it has not made any attempt to do so. A defendant who is charged with committing two offenses is exposed to consecutive sentences because each distinct offense carries its own maximum authorized penalty—not because Congress has determined that the overall conduct with which he is charged warrants that particular aggregate sentence.

Indeed, the cumulative penalty that a defendant faces as a consequence of multiple petty offense

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[13] Section 3584(a) provides in relevant part:

> If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively * * *. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

That provision provides a rule of construction for situations in which the sentencing judge fails to specify whether a defendant's sentences are to run concurrently or consecutively. See *United States* v. *Joetzki*, 952 F.2d 1090, 1098 (9th Cir. 1991); S. Rep. No. 225, 98th Cong., 1st Sess. 127 (1983).

charges provides no consistent assurance of a jury trial right, even under petitioner's own theory. Petitioner conceded below that the government could lawfully have severed the two counts with which he was charged and tried them separately, and that "the question of [his] right to a jury trial [would thereby] have been obviated altogether." J.A. 32; see also J.A. 18-19. Petitioner's acknowledgement that under his approach petty offenses tried jointly would be treated differently from the same offenses tried separately demonstrates that the constitutional right to a jury trial does not, and cannot, turn on the totality of charged criminal conduct.

Under petitioner's approach, a defendant charged with two petty offenses would have a right to a jury trial on both if the prosecutor elected to charge the offenses together in a single information, and on neither if the offenses were charged separately, unless the trial judge severed the charges in the former circumstance or joined them in the latter, in which case, the defendant's positions would be reversed. Aggregation would thus give prosecutors and, to a lesser extent, judges the power to control the "seriousness" of the prosecution.[14] The prosecutor's

[14] As a matter of policy, the federal government will not generally bring charges based on substantially the same acts or transactions that formed the basis for a prior state or federal criminal proceeding. See *Rinaldi* v. *United States*, 434 U.S. 22, 27 (1977) (per curiam); *Petite* v. *United States*, 361 U.S. 529 (1960) (per curiam). That policy had no application in this case, which involved distinct crimes committed on successive days. In any event, except where successive prosecution would implicate the Double Jeopardy Clause, *e.g.*, *Ashe* v. *Swenson*, 397 U.S. 436 (1970), the government's charging policy is not constitutionally compelled. It cannot be invoked as a bar to

decision whether to join or sever counts, moreover, bears no relation to the principles underlying the right to a jury trial. Trying counts together is a "[j]udicial efficiency imposed at no greater risk to the defendant." *United States* v. *Coppins*, 953 F.2d 86, 92 (4th Cir. 1991) (Niemeyer, J., dissenting). "The mere fact that the government [chooses] to consolidate the charges provides no greater justification for a jury trial than if the charges were tried separately." J.A. 32.[15]

Since the desire to proceed efficiently does not "elevate the[] seriousness of the offenses" or change "the risk to the defendant," it should logically have no effect on "whether the defendant is given a jury trial." *Coppins*, 953 F.2d at 92 (Niemeyer, J., dissenting). As one of petitioner's amici argues, "[i]n

federal prosecution, see, *e.g.*, *United States* v. *Mitchell*, 778 F.2d 1271, 1276-1277 (7th Cir. 1985) (citing cases), and it quite clearly does not constrain the charging protocol of state prosecutors.

[15] This Court adopted similar reasoning in *Deal* v. *United States*, 113 S. Ct. 1993 (1993). That case involved 18 U.S.C. 924(c), which provides enhanced penalties "[i]n the case of * * * [a] subsequent conviction." This Court rejected the petitioner's argument that the term "subsequent conviction" does not include a second conviction within a single proceeding, but only "a judgment of conviction entered at a later time," 113 S. Ct. at 1996, in part because the petitioner's interpretation "would [have] give[n] a prosecutor unreviewable discretion either to impose or to waive the enhanced sentencing provisions * * * by opting to charge and try the defendant * * * in separate prosecutions," *id.* at 1997. Observing that, under the petitioner's view, "enhanced sentencing would clearly have been required" if "the same charges had been divided into six separate prosecutions for the six separate bank robberies," the Court declined "to give the statute a meaning that produces such strange consequences." *Ibid.*

order for a defendant to raise the aggregation argument, he must accept that some crimes are not triable by jury, i.e., those criminal offenses carrying a penalty of six months or less. Having accepted this initial premise, the *seriatim* argument is logically unanswerable as the inherent non-jury character of these offenses is not essentially altered by their aggregation in a single proceeding." Jury Trial Group Amicus Br. 3.[16]

Petitioner's amici, the National Legal Aid and Defender Association *et al.*, suggest (Br. 6-8) that, if the constitutional right to trial by jury is not based on the seriousness of the entire prosecution, a legislature could nullify the jury trial right by artificially subdividing criminal conduct into small increments (*e.g.*, defining the offense of unlawful possession of ammunition as the unlawful possession of a single bullet), and authorizing a six-month sentence for each incremental wrong. That would permit the imposition of a significant cumulative sentence without a jury trial. Br. 7-8. A legislature that viewed a crime as serious and deserving of lengthy imprisonment, however, would not likely subdivide it into six-month offenses and thereby leave to the

[16] Petitioner suggests (Br. 22) that arguing that no jury is required in multiple offense trials because the offenses could have been prosecuted separately is akin to arguing that no jury is required for the trial of a serious felony because the defendant could have been charged instead with a petty offense. The arguments are, however, quite different. Prosecutions for two petty offenses carry the same cumulative potential penalties regardless of whether the offenses are tried jointly or severally; a felony conviction, however, ordinarily carries serious collateral consequences and social stigma that could never result from prosecutions for less serious offenses.

discretion of individual prosecutors and judges the decision whether to treat it as such. And there is no evidence that legislatures actually have any inclination to gerrymander offenses so as to avoid jury trials. "The process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world." *New York* v. *United States*, 326 U.S. 572, 583 (1946) (opinion of Frankfurter, J.); cf. *McMillan* v. *Pennsylvania*, 477 U.S. 79, 89 (1986) (rejecting argument based on "specter raised by petitioners of States restructuring existing crimes in order to 'evade'" *In re Winship*, 397 U.S. 358 (1970)).

C. The Analogy To Contempt Trials Lacks Merit

This Court's decision in the contempt context in *Codispoti* v. *Pennsylvania*, 418 U.S. 506 (1974), provides no support for petitioner's argument that the aggregate penalty determines the right to a jury in prosecutions for multiple petty offenses. Codispoti and two co-defendants in a criminal trial, each acting as his own counsel, were cited with several counts of contempt arising from incidents that had occurred during their trial. Following the underlying proceedings, they were each charged, tried, and convicted for multiple contempts, and they were each sentenced to multiple consecutive one-year and two-year terms of imprisonment. The state supreme court affirmed the contempt charges, but this Court vacated them, with the instruction that "on remand another judge, not bearing the sting of [the contemnors'] slanderous remarks and having the impersonal authority of the law, sit[] in judgment on the[ir] conduct." *Mayberry* v. *Pennsylvania*, 400 U.S. 455, 466 (1971). Codispoti and his co-defendants were then convicted once again

on the multiple contempt charges, this time in separate proceedings before a different trial judge. Codispoti was sentenced to six months in prison for each of six contempts and a term of three months for another, each sentence to run consecutively; his co-defendant Langnes was sentenced to five terms of six months each and one term of two months, all to be served consecutively. See *Codispoti*, 418 U.S. at 507-510.

Because the Pennsylvania legislature had established no maximum authorized penalty for contempt, this Court looked to the aggregate penalties actually imposed by the trial court to determine whether the offenses charged against the contemnors were "serious" or "petty." 418 U.S. at 511. The Court explained that, "where no legislative penalty is specified and sentence is left to the discretion of the judge, as is often true in the case of criminal contempt, the pettiness or seriousness of the contempt will be judged by the penalty actually imposed." *Ibid.*; accord *Bloom*, 391 U.S. at 197-201. The Court then applied that principle to the aggregate sentences for contempt, all of which "arose from a single trial, were charged by a single judge, and were tried in a single proceeding." 418 U.S. at 517. Looking to the total sentence, the Court found the existence of a jury trial right on the facts before it. *Ibid.*

Nothing in *Codispoti* suggests that the Court was adopting an approach applicable to the ordinary case, in which a legislature has determined the maximum authorized penalty for each charged offense. The holding in *Codispoti* itself derived largely from concerns unique to charges of criminal contempt. Contemptuous conduct, "though a public wrong, often strikes at the most vulnerable and human qualities of

a judge's temperament. Even when the contempt is not a direct insult to the court or the judge, it frequently represents a rejection of judicial authority, or an interference with the judicial process or with the duties of officers of the court." *Bloom*, 391 U.S. at 202. Moreover, unlike ordinary prosecutions, with criminal contempt "it is normally the trial judge who, in retrospect, determines which and how many acts of contempt the citation will cover. It is also he or * * * another judge who will determine guilt or innocence absent a jury, who will impose the sentences and who will determine whether they will run consecutively or concurrently." *Codispoti*, 418 U.S. at 515. Particularly in light of the "recurring necessity [in the federal system] to set aside punishments for criminal contempt as either unauthorized by statute or too harsh," *Bloom*, 391 U.S. at 206, this Court "has long recognized the potential for abuse in exercising the summary power to imprison for contempt," *id.* at 202. That unique potential for abuse presents a "compelling argument * * * for providing a right to jury trial." *Ibid.*

In *Codispoti*, moreover, since the trial judge waited until the conclusion of the underlying criminal proceedings to charge the various contempts, the most "realistic view of what [actually] occurred [in *Codispoti*] was that," notwithstanding the trial judge's *post hoc* identification of separate contemptuous acts, "there was only one contempt—[each contemnor's] trial conduct as a whole." *Commonwealth* v. *Langnes*, 255 A.2d 131, 136 (Pa. 1969) (O'Brien, J., concurring in part and dissenting in part), vacated and remanded *sub nom. Mayberry* v. *Pennsylvania*, 400 U.S. 455 (1971). "[T]he only measure of the seriousness of * * * [the]

contemnor's criminal acts," therefore, was "the entirety of the court's sentence." J.A. 33. No decision of this Court, however, has applied the rule announced in *Codispoti* to cases in which multiple violations of a criminal statute constitute distinct crimes.[17] Nor should *Codispoti* have application to cases in which the legislature's action has defined the seriousness of the offense by establishing its authorized punishment.

II. IF A DEFENDANT'S JURY TRIAL RIGHT DOES TURN ON AGGREGATING THE POTENTIAL SENTENCES FOR MULTIPLE PETTY OFFENSES, THERE IS NO RIGHT TO A JURY WHERE A JUDGE MAKES A PRETRIAL COMMITMENT TO LIMIT THE AGGREGATE SENTENCE, UPON CONVICTION, TO SIX MONTHS' IMPRISONMENT

The foregoing analysis demonstrates that a defendant's right to a jury trial depends on the maximum sentence authorized for the offense charged, and that when the penalty for an offense establishes that it is petty, it need not be tried by a jury regardless of the number of such offense jointly to be tried. If, however, this Court were to determine that the jury

[17] Contrary to petitioner's argument (Br. 18 n.3), the "aggregation principle" of *Codispoti* does not follow from *Baldwin*. The cited passage in *Codispoti* (418 U.S. at 512 n.4) simply parsed the various concurring and plurality opinions in *Baldwin*. Nor did *Blanton* elevate *Codispoti* to the status of a general guide to the Sixth Amendment; rather, it cited *Codispoti* for the unremarkable proposition that *Baldwin* had held "that a potential sentence in excess of six months' imprisonment is sufficiently severe by itself to take the offense out of the category of 'petty.'" *Blanton*, 489 U.S. at 543 n.7 (citing *Codispoti*, 418 U.S. at 512 n.4).

trial right turns instead on the "seriousness" of the entire prosecution as measured by the aggregate potential penalty, it would not help petitioner. Before trial, the magistrate judge in this case announced that she would not "sentence [petitioner] to more than six months in prison under any circumstances." J.A. 12. A judge's pretrial decision to limit the total punishment that the defendant may receive to no more than six months' imprisonment means that the entire prosecution does not pose the risk of imposing a "serious" penalty. Accordingly, a trial of multiple petty offenses in those circumstances does not trigger the constitutional right to a jury.

The premise of the aggregation theory is that "an accused [has] the right to interpose between himself and a *possible prison term of over six months*[] the commonsense judgment of a jury of his peers," Br. 19 (quoting *Baldwin*, 399 U.S. at 72 (plurality opinion)) (emphasis added by petitioner). It stands to reason, under that theory, that an accused who does not face a "possible prison term of over six months" for petty offense violations should have no similar right. Indeed, petitioner's reliance on *Codispoti*, *supra*, for the aggregation principle virtually compels that result; the Court stated in that case that, where the contempt penalty is left to the discretion of the judge, "the pettiness or seriousness of the contempt will be judged by the penalty actually imposed." 418 U.S. at 511; *Bloom*, 391 U.S. at 211.[18]

[18] A trial judge's pretrial commitment to sentence a defendant charged with a serious felony to no more than six months' imprisonment would not, of course, affect that defendant's right to a jury trial. See Nat'l Legal Aid and Defender Ass'n Br. 28. The difference is that, on an aggregation theory, the "seriousness" of a prosecution for multiple petty offenses

Contrary to the view of petitioner's amici (Nat'l Legal Aid and Defender Ass'n Br. 29-30), there is no "serious practical objection to basing the right to jury trial" on the presiding judge's pretrial commitments regarding sentencing. The proposition (*ibid.*) that "[j]udges cannot make sentencing decisions before trial" is refuted by *Scott* v. *Illinois*, *supra*, and Federal Rule of Criminal Procedure 58(a). In *Scott*, this Court held that a defendant has no right to appointed counsel in a misdemeanor case if he is not ultimately sentenced to a term of imprisonment; courts administering that rule necessarily will often determine before trial whether imprisonment is likely.[19] Likewise, Rule 58(a)(2) provides that the Federal Rules of Criminal Procedure have no force in petty offense prosecutions in which "no sentence of

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results from the happenstance of the combination of distinct offenses committed by a particular defendant and the decision of the prosecutor and the judge to try those offenses jointly, not from a specific legislative judgment that the whole of the prosecution is more "serious" than the sum of the individual offenses. In the case of a serious felony, however, the legislature has made a categorical judgment about the character of the offense, and that legislative judgment is not open to reversal by the action of an individual judge.

[19] Although *Scott* involved a state prosecution, this Court has since described it as holding that, "where no sentence of imprisonment [i]s imposed, a defendant charged with a misdemeanor ha[s] no constitutional right to counsel," *Nichols* v. *United States*, 114 S. Ct. 1921, 1925 (1994), without differentiating between state and federal contexts. As petitioner concedes (Br. 34 n.12), the courts of appeals that have ruled on the issue have concluded that *Scott* applies in federal court. See *United States* v. *Reilley*, 948 F.2d 648 (10th Cir. 1991); *United States* v. *Doe*, 743 F.2d 1033 (4th Cir. 1984).

imprisonment will be imposed." The rules contemplate that that determination will made before trial:

> The term "petty offenses for which no sentence of imprisonment will be imposed" as used in this rule, means any petty offenses as defined in 18 U.S.C. § 19 as to which the court determines, that, in the event of conviction, no sentence of imprisonment will actually be imposed.

Fed. R. Crim. P. 58(a)(3). As a matter of practice, therefore, federal judges deciding whether to appoint counsel for a defendant or to apply the Federal Rules of Criminal Procedure to a petty offense case must determine before trial whether they wish to preserve the option of imposing a term of incarceration.

Although the parameters of the right to a jury trial are not the same as the parameters of the right to counsel, *Argersinger* v. *Hamlin*, 407 U.S. 25, 30 (1972), and the right to trial by jury is not affected by the Federal Rules of Criminal Procedure, *Scott* and Rule 58(a) demonstrate that trial judges have the authority to determine pretrial that a defendant charged with petty offenses will not receive the maximum authorized sentence of imprisonment. And while petitioner's amici assert that "[t]here is an important practical difference * * * between the decision in *Scott* [and under Rule 58(a)(2)] to promise to impose no jail time, and the finer distinction of whether to impose more or less than six months' imprisonment," Nat'l Legal Aid and Defender Ass'n Br. 29 n.21, the distinction is unfounded. To the extent that the concern is that sentencing decisions are being made "before trial without information about the defendant and the offense" (*id.* at 29), a judge constrains his sentencing discretion less

severely by limiting the amount of potential jail time than by promising to impose no term of imprisonment whatsoever.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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October Term, 1995

RAY A. LEWIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

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ARGUMENT

I. THE SIXTH AMENDMENT JURY TRIAL GUARANTEE ATTACHES TO THE ENTIRE PROSECUTION, AND IS NOT "OFFENSE SPECIFIC."

The government's principal argument in this case is that the form of a prosecution, rather than its substance, determines whether the defendant is entitled to a jury trial. The government accepts that prosecutions at which the authorized punishment exceeds six months' imprisonment on any single count must be tried by a jury, but claims that this rule does not apply when the same sentence is authorized as the result of the aggregation of offenses punishable by six months or less. This position derives from a claim that the jury trial right is "offense specific." That assertion, however, is contradicted by the text of the Sixth Amendment, which attaches the jury trial right to the "prosecution," and not to "offenses." Moreover, although the government proffers a putative common-law justification for its position, in fact there is no evidence that at common law a court of summary jurisdiction could impose a sentence greater than six months' imprisonment, in excess of its jurisdictional limit, when multiple petty offenses were tried together. In the end, the government's position in this case characterizes the choice between a jury trial and a non-jury trial as nothing more than the choice between two procedural alternatives. The government fails to acknowledge that the jury trial is a fundamental structural component of the American political and legal systems and is the preferred mode of trying criminal cases. *Singer v. United States*, 380 U.S. 24 (1965). The Court has crafted a limited exception to the requirement of jury trials that applies in those cases in which the defendant is tried either on a

single petty offense or on multiple offenses whose aggregate maximum punishment is six months' imprisonment or less. *Callan v. Wilson*, 127 U.S. 540 (1888). The common-law practices cited by the government provide no basis for the dramatic expansion of this limitation that the government proposes.

1. The government asserts that the common-law history of the jury trial right indicates that no jury trial is required when multiple petty offenses are joined in a single trial, regardless of the number of offenses so joined, and regardless of the ultimate sentencing consequences to the defendant. However, the government has failed to produce any historical support for this position, because it presents no evidence that a common-law summary court could exceed its jurisdictional limits when multiple offenses were joined.

The two early English cases cited by the government (Government's Brief "G.B." at 15) suggest only that two petty offenses could be tried jointly before a justice of the peace.[1] They are not dispositive of the instant case. It is

[1] Both of those cases, *The King v. Swallow*, 101 Eng. Rep. 1392 (K.B. 1799) and *The Queen v. Matthews*, 88 Eng. Rep. 609 (Ch. 1710) appear to sanction the trial of multiple petty offenses in a single proceeding. However, a contemporaneous case, *The King v. Salomons*, 1 T.R. 249-252 (K.B. 1786), suggests that that practice was not universally accepted. There, the defendant was "charged with two distinct offenses, each of which would subject him to a separate penalty." The court noted that "it is to be doubted" that both offenses "could have been included in one conviction." It is also significant that the government cites late 19th century editions of treatises on practices of the justices of the peace to support its position. G.B. at 15. The editions of those treatises in use at the time the Constitution and Bill of Rights were ratified do not contain the language relied upon by the government. *See, e.g.*, 1 Richard Burn, *Justice of the Peace*, 390-97 (18th Ed. 1793).

not Mr. Lewis's position that *all* multiple petty offense prosecutions must be tried by a jury, only those at which the authorized penalty exceeds six months, the jurisdictional limit for non-jury trials established by this Court in *Baldwin v. New York*, 399 U.S. 68 (1970). Common-law practice generally limited summary jurisdiction to "the imposition of fines of up to a hundred pounds and sentences with hard labor up to six months." Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 Harv. L.R. 917, 934 (1926) (footnote omitted); *see also Baldwin*, 399 U.S. at 71 ("with a few exceptions, crimes triable without a jury in the American States since the late 18th century were also generally punishable by no more than a six-month prison term") (footnote omitted). The government cites no historical evidence that a magistrate or a justice of the peace could, by trying several offenses together, impose a penalty greater than that ordinary jurisdictional limit.

When interpreting the Constitution's jury trial guarantees, the Court has limited its reliance on the common law to the acceptance of those common-law rules that were so clearly understood and so universally incorporated into colonial practice that they could necessarily be deemed incorporated into the language of the Constitution. *Schick v. United States*, 195 U.S. 65 (1904). This cannot be said about the treatment of multiple petty offenses, since English antecedents did not produce a uniform

colonial practice. "Different environments evolved different applications of trial by jury and its limits." Frankfurter & Corcoran, *supra*, at 936. Accordingly, the government has failed to establish with sufficient clarity the parameters of either English common-law practice or colonial practice with respect to the treatment of multiple petty offenses.

The common law provides no greater support for the government's argument that the jury trial right is exclusively "offense specific."[2] The Constitution must be interpreted in light of the common law, but the Court has never read it as incorporating every peculiarity of common-law practice. In fact, the Court has frequently deviated from common-law practice when interpreting the Sixth Amendment. Thus, in *Williams v. Florida*, the Court rejected the notion that "every feature of the jury as it existed at common law . . . was necessarily included

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[2] Even accepting the government's insistence that the common-law character of the offense charged determines jury triability, Mr. Lewis was still entitled to a jury trial. He was charged with an offense that was serious, and would have been tried by a jury, at common law. Brief for Petitioner at 24-26. Nor is the government correct in asserting that this question is "not properly before this Court." G.B. at 20, n.9. That the common-law character of Mr. Lewis's conduct entitles him to a jury trial is simply an argument in support of his claim that he was entitled to jury trial under the Sixth Amendment. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 112 S.Ct. 1522, 1532 (1992). *See also, Lebron v. National R.R. Passenger Corp.*, 115 S.Ct. 961, 964-65 (1995) ("alternative argument" first presented in brief on the merits was "fairly embraced" within the question presented).

in the Constitution when that document referred to a 'jury.' " 399 U.S. 78, 91 (1970) (footnote omitted). *See also Colgrove v. Battin*, 413 U.S. 149, 156 (1973) (constitutional history reveals "no intention on the part of the Framers to equate the constitution and common-law characteristics of the jury") (citation to *Williams* omitted). Similarly, *Duncan v. Louisiana* explicitly rejected as arbitrary the subjective process by which jury triability or the designation as "petty" was determined at common law. 391 U.S. 145, 160-61 (1968). Since *Duncan*, the Court has defined the category of cases to which the jury trial right attaches almost exclusively by the authorized penalty, in full recognition that this deviates from common-law practice. *Blanton v. City of North Las Vegas*, 489 U.S. 438, 542 (1989); *Baldwin*, 399 U.S. at 72-74.

2. The government's "offense specific" argument leads to outcomes that are clearly out of step with the proper interpretation of the Sixth Amendment. First, according to the government, multiple petty offenses can be disposed of at a non-jury trial even if the authorized penalty is several years' imprisonment. *But see Codispoti v. Pennsylvania*, 418 U.S. 506 (1974) (jury trial required on jointly tried petty contempts with aggregate penalty of 39 months' imprisonment); *see, generally, United States v. Goodwin*, 457 U.S. 368, 387 & n.1 (1982) (Brennan, J., dissenting) (multiple petty offenses with aggregate authorized penalty of 28 months' imprisonment). Moreover, the government's focus on the nature of the offense rather than the aggregate authorized penalty would mean that a defendant who was jointly tried on a felony and a petty offense would have the right to have the jury determine guilt or innocence only on the felony, but that the

judge would remain the finder of fact on the petty offense.

The Sixth Amendment guarantees a jury trial in "all criminal prosecutions." The government's lengthy string of citations to cases in which the Court used the term "offense" in discussing the scope of the Sixth Amendment guarantee (G.B. at 10-14) establishes nothing more than that the case at bar is one of first impression. The cases on which the government relies do not establish that the Sixth Amendment jury trial guarantee is "offense specific." They merely establish that the term "criminal" in the Sixth Amendment refers to "serious," rather than "petty," criminal matters. *Callan*, 127 U.S. at 549. Since "criminal" modifies "prosecution," the question posed by this case is not whether the charged offense was serious, but rather whether the "prosecution" itself was serious.

The Court, construing the Sixth Amendment in light of a universally accepted common-law practice, has arrived at the conclusion that a trial on a single offense punishable by less than six months' imprisonment is not a "serious" prosecution. *Baldwin*, 399 U.S. at 72-74. However, based on this definition of criminal seriousness, any prosecution at which the authorized penalty exceeds six months' imprisonment – whether through aggregation or not – must be tried by a jury. *See Frank v. United States*, 395 U.S. 147, 149 (1969) ("In . . . criminal prosecutions, the severity of the penalty authorized . . . is the relevant criterion" determining jury triability). The prosecution in this case was accordingly "serious" within the meaning of the Sixth Amendment.

The authorized penalty represents the most accurate measure of society's judgment of the defendant's conduct. *Blanton*, 489 U.S. at 541-42; *Baldwin*, 399 U.S. at 68. Thus, the applicability of statutes such as 18 U.S.C. § 3584(a) is relevant to considering whether the jury trial right attaches to a particular prosecution. The government recognizes that 18 U.S.C. § 3584(a) is a substantive sentencing statute authorizing consecutive sentences in multiple petty offense prosecutions. G.B. at 23. The government also recognizes that this statute represents a congressional judgment that committing multiple offenses is more serious than committing one. G.B. at 22-23.[3] From these propositions flows the conclusion that the aggregate authorized penalty is a more accurate gauge of the seriousness of a single prosecution than is the penalty authorized for just one offense in that prosecution, no matter how many are charged.

This is so even if Congress "cannot asses the seriousness of all potential combinations of offenses" (G.B. at 23) to which § 3584(a) applies, because such an assessment is not a necessary prerequisite to attaching the jury trial right to a multiple petty offense prosecution. Congress cannot assess the ultimate seriousness of all of the potential combinations of aggravating and mitigating circumstances in a case involving a single serious offense, yet the authorized sentence is still the most accurate measure of criminal seriousness in that situation.

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[3] Significantly, in so conceding, the government has admitted that the principal basis for the decision below was incorrect.

The Court's recognition of the significance of an authorized penalty in excess of six months' imprisonment animated its decision in *Codispoti v. Pennsylvania*. There, the defendant was tried on seven acts of criminal contempt at a single bench trial; after convicting the defendant the judge aggregated the "petty" (that is, six-month or less) sentences for each count and imposed a 39-month term of imprisonment. The Court held that the contemnor should have received a jury trial because this aggregation of petty penalties rendered the prosecution "serious." 418 U.S. at 517.[4]

For the purposes of the jury trial right, the only difference between criminal contempt and other crimes is the manner in which the maximum authorized penalty is set. In contempt cases, where there is no statutory maximum set by a legislature, the judge determines criminal seriousness by imposing sentence. *Codispoti* stands for the proposition that this inherently "legislative" decision requires a jury trial in contempt cases when the judge determines that an aggregate "serious" penalty is authorized. 418 U.S. at 517.[5] That reasoning has equal force in

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[4] The government incorrectly argues that *Codispoti* did not involve an aggregation of penalties at all because the contemnor was in reality tried on "one contempt," which the government defines as his "trial conduct as a whole." G.B. at 29, citation omitted. The Court explicitly rejected this characterization of the record in *Codispoti*. The Court's decision makes clear that it viewed the contemnor as facing "individual charges" that were tried in a single proceeding, and for which "separate sentence[s]" were imposed. 418 U.S. at 516.

[5] The government is incorrect in asserting that the rule of *Codispoti* derives from "concerns unique to charges of criminal contempt" – specifically that a jury trial is required because of

those non-contempt cases in which the legislature itself has made this same determination.[6]

Codispoti also addresses the issue of the difference between joint and serial trials of multiple petty offenses. There, since the defendant was tried on seven petty contempts in a single proceeding, the aggregation of the petty penalties rendered that prosecution "serious" under the Sixth Amendment. *Id*. But a plurality of the Court also recognized that if the contempts had been adjudicated serially a total sentence in excess of six months could constitutionally have been imposed without a jury trial because "each contempt [would have] been dealt with as

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the "potential for abuse" inherent in having the judge serve as both "victim" and the judge. G.B. at 28-29. This argument fails to recognize that in *Codispoti* a different judge presided over the contempt trial. 418 U.S. at 507. In any event, that concern is fully addressed by the rule of *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971) and Fed. R. Crim. P. 42(b), which disqualifies the judge if the contempt charged involves "disrespect to or criticism of" that judge.

[6] Limiting *Codispoti* to its facts, as the government argues, would mean interpreting the Sixth Amendment as affording a more expansive jury trial right to acts of criminal contempt than to that same conduct when charged as a violation of a criminal statute. *Cf. United States v. Dixon*, 113 S.Ct. 2849, 2853-54 (1993) (defendants convicted of contempt for conduct that violated both a court order and a specific criminal statute). Under the government's position in this case, there is no right to a jury trial on several petty offenses tried together, no matter how great the aggregate penalty. But if those same actions violated a court order and were tried as criminal contempts, the Sixth Amendment, as applied in *Codispoti*, would require a jury trial. This is a particularly anomalous outcome, since historically contempts were not tried by a jury at all. *Bloom v. Illinois*, 391 U.S. 194, 195-96 (1968).

a discrete and separate matter." 418 U.S. at 515. As long as the authorized penalty for each of those individual prosecutions was petty, none of them would be considered "serious." Thus, even though the ultimate consequence to the defendant would be a lengthy sentence, such serial prosecutions would not implicate the Sixth Amendment's jury trial guarantee.

3. Attaching the jury trial right to prosecutions where the authorized penalty exceeds six months' imprisonment, whether by aggregation or not, is fully consistent with the purposes of the jury trial itself. The government treats the choice between a jury trial and a non-jury trial as arbitrary and unimportant, in effect reducing the jury trial to an abstract procedural right that is of little concern either to the defendant or society. In fact, the right to a jury trial is of enormous constitutional significance. The Court has long recognized that it is not only the preferred mode of adjudicating criminal cases, but is the "tribunal which the Constitution regards as most likely to produce a fair result." *Singer v. United States*, 380 U.S. at 36.

As expressed in the Constitution, the right to a jury trial in serious criminal cases represented a fundamental cornerstone of the Framers' conception of liberty. The Court has repeatedly emphasized the importance of interposing the lay jury as the finder of fact in those cases in which the government seeks the imposition of a lengthy period of imprisonment. *Singer*, 380 U.S. at 31 (jury trial right "clearly intended to protect the accused from oppression by the government"); *Duncan*, 391 U.S. at 156. The jury trial provides a critical buffer between the individual and the state's power to deprive him of liberty. It

thus serves to protect all citizens from the "corrupt or overzealous" prosecutor or the "compliant, biased or eccentric" judge. *Id.*

The requirement of jury trials in serious cases accordingly benefits all of society, not just the defendant on trial. It is more than a rule of criminal procedure. It is a political right – "an allocation of political power to the citizenry." Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U.Chi. L. Rev. 867, 876 (1994). Civic participation in the criminal justice system has always been recognized as the most satisfactory means of curtailing the possibility of "unchecked power." *Duncan*, 391 U.S. at 156. As such, it assures that the public will continue to accept the legitimacy of the criminal justice system in general and its ability to mete out serious punishments in particular.

This democratic function holds true whether the serious penalty derives from a single count or from several counts. With respect to the core concerns of the jury trial right, these two situations are indistinguishable. They present equivalent opportunities for prosecutorial or judicial abuse, and are equally liable to result in a serious punishment.

II. THE GOVERNMENT HAS FAILED TO ADDRESS MR. LEWIS'S ARGUMENT THAT ONLY THE LEGISLATURE CAN EXTINGUISH THE RIGHT TO A JURY TRIAL.

In his main brief, Mr. Lewis demonstrates that there exists no common-law or constitutional precedent for allowing the jury trial right to be unilaterally extinguished by the sentencing judge. Brief for Petitioner at 27-31. The government has simply ignored this argument, and in fact has presented no historical evidence to support its view that a pretrial sentencing stipulation can deprive a defendant of a jury trial. Instead, the government merely invokes arguments that have repeatedly, and with sound justification, been rejected by the Court.

The government argues that either a pretrial sentencing promise or the actual sentence imposed determines jury triability. G.B. at 31. But in statutory offense cases the Court has consistently held that the subjective sentencing consequences faced by the particular defendant are in no way relevant to the jury trial right. The authorized penalty set by the legislature, and not the judge's own view of the defendant's conduct, determines jury triability. That is why the sentence actually imposed is irrelevant to whether the defendant was entitled to a jury trial. *Blanton v. City of North Las Vegas*, 489 U.S. at 541-42; *Duncan v. Louisiana*, 391 U.S. at 160-61; *District of Columbia v. Clawans*, 300 U.S. 617, 628 (1937). The government fails to explain how the right to a jury trial could be extinguished by a pretrial sentencing stipulation, when it is never extinguished by the sentence actually imposed.

A criminal prosecution at which the authorized penalty exceeds six months' imprisonment is serious whether that penalty results from aggregation or not. Other than to restate its view that the aggregate penalty should not trigger a jury trial at all (G.B. at 31, n.18), the government has failed to assert a rational distinction between prosecutions that are "serious" as the result of the aggregation of authorized penalties and those that are "serious" because the penalty authorized for a single count exceeds six months' imprisonment. Thus, the government's position would permit a judge to utilize a pretrial stipulation to deprive a defendant of a jury trial in *any* case, even where serious felonies were charged.

It is of no relevance here that in contempt cases either a pretrial sentencing promise or the sentence actually imposed determines jury triability. *Frank v. United States*, 395 U.S. at 149-50. There is no legislatively determined statutory maximum in criminal contempt cases. Thus, although the Court disfavors making jury triability contingent on the judge's subjective view of criminal seriousness, in criminal contempt cases there is no other measure of seriousness available. In any event, deferring to the court's own view of criminal seriousness is appropriate in such cases, since the offense is against the court itself.[7] But where the offense is against society, it is society's judgment alone that determines the jury trial right. "In

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[7] Moreover, absent such a rule all contempts would have to be tried by a jury. Since there is no maximum sentence set by the legislature, any contempt is potentially punishable by more than six months' imprisonment unless the judge decides otherwise.

[non-contempt] criminal prosecutions, the severity of the penalty authorized, not the penalty actually imposed, is the relevant criterion." *Id.* at 149.

Finally, it is significant that the government does not argue that the procedure authorized in *Scott v. Illinois* is applicable to the jury trial right. In *Scott*, the Court held that the Sixth Amendment does not require the appointment of counsel in state court misdemeanor cases if the court promises in advance of trial not to impose a sentence of imprisonment. 440 U.S. 367, 374 (1979). There are persuasive reasons for the Court to confine the holding of *Scott* to that particular situation.

The nature of the rights implicated in *Scott* and in this case are dramatically different. At stake in *Scott* was the issue of who would represent the defendant at trial – appointed counsel, retained counsel, or no counsel. While this is an extremely important decision, it is primarily of concern only to the defendant himself. In contrast, the potential deprivation of a jury trial implicates the considerably broader question of who will judge guilt or innocence. This is a decision in which all of society, and not just the defendant on trial, has an interest. This difference is illustrated by the fact that a defendant cannot be compelled to be represented by counsel against his will (*Faretta v. California*, 422 U.S. 806, 836 (1975)), but can be compelled to be tried by a jury against his will. *Singer v. United States*, 380 U.S. at 36. "[T]he maintenance of the jury as a fact-finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of the government . . . and . . . the court must be had." *Id.* at

34 (quoting *Patton v. United States*, 281 U.S. 276, 312-13 (1930)).

There is another important difference between *Scott* and the instant situation. Here, the magistrate judge wielded the pre-trial stipulation as a means of extinguishing the jury trial right in its entirety. This went far beyond the bounds of *Scott*. *Scott* did not sanction the extinction of the core of the Sixth Amendment right – which guarantees the "Assistance of Counsel" – in its entirety. Rather, by refusing to extend the rule of *Gideon* to state court misdemeanor cases, it affected only the right to appointed counsel. 440 U.S. at 370. Even under *Scott*, a defendant in a state court misdemeanor case has an indelible right to be represented by counsel, and no unilateral action by the trial court can extinguish that right.[8]

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[8] The government has failed to identify a single Sixth Amendment right that is unilaterally extinguishable by the trial court. The court certainly cannot promise to impose a lenient sentence and then try the defendant in secret, or deny him notice, the opportunity to be heard, or to confront the evidence against him, even when the defendant is charged with a single petty offense. *See, e.g., In re Oliver*, 333 U.S. 257, 273 (1948) (Sixth Amendment rights to notice, opportunity to be heard, public trial, confrontation and counsel attach to prosecution for a single petty offense).

CONCLUSION

For the reasons stated herein, as well as those in his main brief, petitioner prays that the judgment below be reversed.

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No. ~~95-6564~~

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1996

Ray A. Lewis, *Petitioner*

v.

The United States of America, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE, THE JURY TRIAL GROUP, IN SUPPORT OF PETITIONER

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No. 95-6564

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1996

Ray A. Lewis, *Petitioner*

v.

The United States of America, *Respondent.*

**On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit**

***BRIEF OF AMICUS CURIAE,
THE JURY TRIAL GROUP,
IN SUPPORT OF PETITIONER***

STATEMENT OF INTEREST AND SUMMARY OF ARGUMENT

The District of Columbia Superior Court Trial Lawyers' Association ("SCTLA") is composed primarily of private criminal attorneys defending indigent clients under the Criminal Justice Act of 1974 (Pub. L. 93-412) in the District of Columbia courts. The Jury Trial Group ("JTG") is an independent affiliate of the SCTLA formed in 1994 to defend the right to jury trial in the District of Columbia. The JTG has appeared as *amicus curiae* before the District of Columbia Superior Court, as well as the District of Columbia Court of Appeals. The JTG filed a petition for writ of mandamus in

this Court, *In re David Thornwell*, 95-5184, denied October 2, 1996.

Both counsel for petitioner Lewis and the Solicitor General have consented to the filing of a brief *amicus curiae* by the JTG. Copies of written consents were filed with this Court on February 23, 1996 and original consents will be sent directly to the Clerk of the Court by the parties themselves.

In this brief *amicus curiae* will argue that the aggregation problem cannot be resolved within the parameters of the "petty" offense exception to the Article III and Sixth Amendment right to jury trial. Aggregation exposes a number of dilemmas, inherent in the "petty" offense exception, that can only be rationally resolved by returning the plain language of the Constitution.

ARGUMENT

I. *Transcending the Aggregation Problem*

When considering the question of the Sixth Amendment and Article Three right to jury trial, conventional wisdom views the issue of aggregation of "petty" offenses as the primary question still to be resolved. In *Blanton v. City of North Las Vegas*, 489 U.S. 538 (1989), this Court established the six month penalty test as, in reality, an automatic rule of law, departing from the usual precedent governing legal presumptions and allowing only collateral punishment to establish the rare exception to an otherwise inflexible denial of the constitutional right to jury trial for criminal offenses punishable by six months imprisonment or less. *Blanton*, 489 U.S. at 543. Thus, under *Blanton*, a defendant charged with a single offense punishable only by six months imprisonment is not constitutionally entitled to trial by jury. The primary question presented by *Lewis v. U.S.*, 65 F.3rd 257 (2nd Cir. 1995), and thus the instant appeal, is that of aggregation, which asks whether a defendant is entitled to trial by jury when charged in a single proceeding with multiple offenses, each of which is punishable by no more than six months imprisonment, but for which the aggregate sentence could exceed six months. Additionally, the Court has requested that parties brief the question of whether or not a judge, by

promising not to give more than a six months aggregate sentence, can deny jury trial for otherwise jury-demandable offenses.

The Second Circuit in *Lewis* initially answers the aggregation question by holding, without benefit of a citation or other support, that it is obvious that *Blanton* focuses on the seriousness of each individual offense. *Lewis*, 65 F.3rd 254. This is a circular argument because the focus of the inquiry as to seriousness is determinative of the result. The second answer given by the *Lewis* Court to the aggregation question is that, as the government could have tried each offense *seriatim*, aggregation in a single proceeding "provides no greater justification for a jury trial than if the charges were tried separately." *Lewis*, 65 F.3rd at 255. In order for a defendant to raise the aggregation argument, he must accept that some crimes are not triable by jury, i.e., those criminal offenses carrying a penalty of six months or less. Having accepted this initial premise, the *seriatim* argument is logically unanswerable as the inherent non-jury character of these offenses is not essentially altered by their aggregation in a single proceeding.

The suggestion by the Court that would allow a bench trial if the trial judge makes a pretrial commitment of a six month aggregate sentence, also violates the logic of the *seriatim* argument. Why should the government be forced to forego the punishment authorized for each offense, merely because they are aggregated? This is particularly true for offenses that may be of a similar character, but do not arise out of the same act or occurrence. F.R.Crim.P. 8(a); SCR-Criminal 8(a).

However, despite the logic of the *seriatim* argument, its necessary consequences cannot be constitutionally accepted. *Lewis* and other decisions denying jury trial for aggregated offenses have focused on the seriousness of each individual offense charged. Under the precedent of *Blockburger v. U.S.*, 284 U.S. 299 (1932), and its progeny, it is not a violation of double jeopardy for the legislature to establish multiple criminal offenses and multiple punishments for a single act. The State may even constitutionally charge and punish for both a greater and lesser included offense. *Missouri v. Hunter*, 459 U.S. 359 (1983). It is the legislature that determines the

unit of prosecution and therefore defines the offense. The convergence of *Blockburger* and the denial of aggregation allow for some startling results once we focus not on single, statutorily separate offenses, but on the total sentence at issue for all offenses in a single proceeding. This approach was followed in *Codispoti v. Pennsylvania*, 418 U.S. 506, 517 (1973), the primary precedent used to support jury trial for aggregated offenses.

In the District of Columbia, possession of unauthorized ammunition is a misdemeanor. D.C. Code §6-2361. The City Council could make this offense punishable by six months imprisonment, rendering it non-jury demandable under *Blanton*, and establish a single bullet as the unit of prosecution. Thus a defendant found in unlawful possession of a handgun with a twenty round magazine, a single act, could be charged with twenty counts of possession of unauthorized ammunition and convicted in a single bench trial and be sentenced to ten years imprisonment. Any discrete criminal act can result in an infinite number of criminal offenses. Thus under *Blanton*, *Blockburger* and the aggregation precedent articulated in *Lewis*, the legislature can amend the criminal code and totally eliminate jury trial for offenses punishable by imprisonment.

The Court has suggested that as a possible solution to this problem, a judge could make a pretrial commitment to give no more than six months imprisonment and still have a bench trial for aggregated proceedings. This is not a logical solution. It fails to address the *seriatim* argument. It does look to the total imprisonment imposed, but fails to consider the consequences of multiple convictions. It forces the trial judge to determine the maximum sentence before hearing the evidence in the case. The pretrial commitment rule would also be fairly simple for the government to avoid. Rather than formally aggregating cases they could be proceeded against separately, but on the same day and in front of the same judge, thus gaining much of the benefit of aggregation. The offenses would be non-jury demandable and sentences longer than six months could still be imposed for a single act.

The most serious danger in allowing a pretrial commitment of no more than six months imprisonment is

that this precedent, like failing to aggregate, can be used to eliminate trial by jury. There appears to be no reason why this same rationale would not apply to all offenses. If the trial judge promised to impose no more than six months imprisonment, why should he not be able to deny jury trial for a misdemeanor carrying a one year sentence or for a felony for which the maximum punishment is ten or twenty years imprisonment?

The dangers of refusing to aggregate offenses or permitting a pretrial commitment are obvious and a statutory interpretation that condones this precedent is obviously flawed. The Constitution does not, and cannot, contain the seeds of its own destruction; an interpretation of a constitutional provision that destroys the constitutional right embodied therein cannot be maintained. Yet the *seriatim* argument is logically unanswerable. This seeming paradox can only be resolved by transcending the aggregation argument. The logical and practical difficulties revealed by the aggregation problem can only be truly resolved by returning to the plain language of the Constitution and overruling the line of precedent that began with *Callan v. Wilson*, 127 U.S. 540 (1888), and had its logical culmination in *Blanton*. As this Court held in *Duncan v. Louisiana*, "...our decisions interpreting the Sixth Amendment are always subject to reconsideration." *Duncan v. Louisiana*, 391 U.S. 145, 158 (1967).

II. *Inherent Nature versus Penalty*

For the first century after the adoption of the Constitution, this Court strictly interpreted the language of the Sixth Amendment and Article Three requiring trial by jury even in wartime. See *Ex parte Milligan*, 71 U.S. 115, 120 (1866) ("The Constitution of the United States is a is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances.") In *Callan v. Wilson*, 127 U.S. 540 (1888), this Court first articulated the concepts of "petty offenses", i.e., non-jury demandable crimes, versus "serious offenses", i.e., jury demandable crimes, creating the "petty offense exception" to the constitutional guarantees of jury

trial. The requirement that an jury demandable offense be "serious" rather than a crime created an immediate conflict between the plain language of the Constitution and Supreme Court precedent. U.S. Const. amend VI.; U.S. Const. art. III; see also *District of Columbia v. Clawans*, 300 U.S. 617, 634 (1937) (MacReynolds & Butler, JJ., dissenting). The inquiry into seriousness, however, still depended in the inherent nature of the offense. *Callan*, 127 U.S. at 556. This Court's holding in *Blanton v. City of North Las Vegas* that it would no longer inquire into the inherent nature of an offense very clearly breaks with previous Sixth Amendment jurisprudence. "...[O]ur earlier decisions focused on the nature of the offense and whether it was triable by jury at common law." *Blanton*, 489 U.S. at 541. The statement that "[i]n more recent years, however, we have sought more 'objective indications of the seriousness with which society regards the offense,'" *Blanton*, 489 U.S. 541, and the citation to *Frank v. U.S.*, 395 U.S. 147, 148 (1969) are misleading. *Frank* was a contempt case and contempts were not triable by jury at common law. *Cheff v. Schnackenberg*, 384 U.S. 373, 380 (1965) (criminal contempts by nature not jury-demandable). The reliance of the *Frank* Court on the "objective indications" precedent cited in *District of Columbia v. Clawans*, 300 U.S. 617 (1936) is also misleading. While precedent is occasionally obscure, *Clawans* is an example of pre-*Blanton* precedent that held that the inquiry into the objective indications of seriousness, predominately the penalty authorized or imposed, did not take place until a court determined that an offense was inherently petty and not of a criminal nature. In *Clawans*, which concerned the offense of selling second hand property without a license, this Court noted that this offense was not indictable at common law and held that its moral quality was inoffensive. *Clawans*, 300 U.S. at 625. But the *Clawans* Court refused

> ...to foreclose consideration of the severity of the penalty as an element to be considered in determining whether a statutory offense, *in other respects trivial and not a crime at common law*, must be deemed so serious as to be comparable with common law crimes, and thus to entitle the accused to the benefit of a jury trial prescribed by the Constitution.

(emphasis supplied) *Clawans*, 300 U.S. at 625. This principle was affirmed in *Duncan v. Louisiana*, 391 U.S. 145 (1967), where this Court held that "[c]rimes carrying possible penalties up to six months do not require jury trial *if they otherwise qualify as petty offenses*." (emphasis supplied) *Duncan*, 391 U.S. at 159.

Thus, the unanimous decision in *Blanton* represents not an adherence to or logical extension of previous precedent, but a revolutionary departure. The use of the six month test in *Baldwin v. New York* was a compromise, as several justices were willing to agree that more than six months imprisonment merited jury trial, but would not agree that less than six months imprisonment meant that there was no constitutional right to a jury. *Baldwin v. New York*, 399 U.S. 66, 74 (1969). Before *Blanton* and *Baldwin*, an inquiry as to the maximum penalty imposed was a secondary test, only resorted to for inherently petty offenses. This subsidiary test has swallowed the primary criterion, the inherent criminality or seriousness of an offense, just as the petty versus serious distinction restricted the constitutional guarantee of trial by jury for all crimes and the petty offense doctrine itself now threatens the constitutional right to jury trial. Thus over a century of Supreme Court jurisprudence addressing jury trial for "petty" offenses has shown the natural tendency for any exceptions to constitutional guarantees to grow and eliminate the rights they ostensibly qualify.

III. *Blanton and Plain Language*

The confusion evident in petty offense jurisprudence was and is necessary because *Blanton* is not just a departure from precedent, but contrary to the plain language of the Constitution. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury..." U.S. Const. amend VI. Article Three provides that "[t]he trial of all crimes, except in cases of impeachment, shall be by jury..." U.S. Const. art. III § 2. The Sixth Amendment and Article

Three are unequivocal, unlike the Seventh Amendment, these provisions provide no exception to their clear commands. Some jurists have acknowledged the truly revolutionary nature of the *Blanton* six month penalty test. The Second Circuit in *Lewis* stated that "[d]*espite the absolute language of the Sixth Amendment*, the Supreme Court has made clear that a jury trial is required only for those offenses that are 'serious' in nature; bench trials are sufficient for 'petty' offenses." (emphasis supplied) *Lewis*, 65 F.3rd at 253-4. In his dissent in *Baldwin v. New York*, Justice Black rejected the "petty" or "serious" distinction,

> The Constitution guarantees a right of trial by jury in two separate places but in neither does it hint of any difference between 'petty' offenses and 'serious' offenses...Thus the Constitution itself guarantees a jury trial '[i]n all criminal prosecutions' and for 'all crimes.' Many years ago this Court, without the necessity of amendment pursuant to Article V, decided that 'all crimes' did not mean 'all crimes' but meant only 'all serious crimes.' Today three members of the Court would judicially amend that judicial amendment and substitute the phrase 'all crimes in which punishment for more than six months is authorized'...Such constitutional adjudication, whether framed in terms of 'fundamental fairness', 'balancing', or 'shocking the conscience' amounts in every case to little more than judicial mutilation of our written Constitution.

Baldwin, 399 U.S. at 74-5. This is the rule in the majority of jurisdictions. Cato Institute lawyer Timothy Lynch notes that "[a]pproximately thirty states already recognize the right to jury trial in petty criminal cases." T. Lynch, *Rethinking the Petty Offense Doctrine*, 4 KAN. J. LAW PUB. POL'Y 16 (Fall 1994).

Attempts have been made to justify the petty offense exception. In *Duncan v. Louisiana*, this Court notes correctly that some "petty" offenses were among those offenses tried summarily under colonial and English practice before the enactment of the Constitution. *Duncan*, 391 U.S. at 160.

The Court then holds,

> So-called petty offenses were tried without juries both in England and the Colonies and have always been held to be exempt from the otherwise comprehensive language of the Sixth Amendment's jury trial provisions. There is no substantial evidence that the Framers intended to depart from this established common law practice.

Duncan, 391 U.S. at 160. This holding is the so called "codification" argument and is erroneous. The codification argument was first raised in Justice Frankfurter's 1926 Harvard Law Review Article which asserts that the Sixth Amendment cannot be taken literally and that the Founders meant only to codify the existing practices of the colonies. F. Frankfurter, *Petty Federal Offenses and and the Constitutional Guaranty of Trial by Jury*, 39 HAR. LAW REV. 917-1013 (1926). The most substantial evidence that the Founders intended to depart from English and colonial practice before the Constitution is the clear language of the Sixth Amendment and Article Three which make no distinction between petty and serious offenses, but speak only of criminal offenses and crimes. U.S. Const. amend. VI; U.S. Const. art. III. It is notable that some state constitutions did make explicit exceptions to the right to trial by jury. The Indiana Constitution of 1818 states that, "in all criminal cases except in petit misdemeanors, which shall be punished by fine only, not exceeding three dollars...the right of trial by jury shall remain inviolate." S. Kaye, *Petty Offenders Have No Peers*, 26 CHI. LAW REV. 257-8 (1959) . Similarly, the Seventh Amendment makes an explicit exception to the right to jury trial for civil cases. U.S. Const. amend. VII.

Because *Callan* focuses on the inherent nature of an offense, its holding is not that all offenses tried without a jury previous to the Constitution may now be summarily tried, but that if an offense was tried summarily, this fact is simply one indication that the offense may be "petty". English and colonial practice was not based on the inherent nature of the offense: "There was no unifying consideration as to the type of criminal offense subjected to summary trial..."

Frankfurter, *supra* at 927. Despite the fact that some so-called "petty" offenses continued to be tried summarily, previously summary offenses were among those tried by jury after the adoption of the Constitution. Tax frauds and excise offenses, for example, were tried summarily by commissioners of excise and revenue and justices of the peace. 4 BLACKSTONE, COMMENTARIES * 278. Summary proceedings were appropriate, says Blackstone, because of the necessity of collecting revenue and the convenience for the Crown and defendants. 4 BLACKSTONE, COMMENTARIES * 278 These reasons, rather than assertions that tax fraud was not a crime or was somehow "petty", account for the fact that it was triable summarily.

Another error of the *Duncan* Court was the assertion that summary trials were part of the common law. All English summary trials occurred as a result of explicit parliamentary authorization. See *Schick v. U.S.*, 195 U.S. 65, 80 (1904) (Harlan, J., dissenting). "Very gradually the legislature ventured to make some offenses triable 'upon examination' by justices of the peace, that is to say, without a jury. This was a serious break with common law tradition at several points." T. PLUCKNETT, CONCISE HISTORY OF THE COMMON LAW (5th ed. 1956) at 438. The most authoritative statement of the status of summary trials at common law is made by William Blackstone,

> By a summary proceeding I mean principally such as is directed by several acts of parliament (*for the common law is a stranger to it*, unless in the case of contempts)...But it has of late been so far extended, as if a check be not timely given to threaten the disuse of our admirable and truly English trial by jury, unless only in capital cases...This change in the administration of justice hath some mischievous effects...the extensive power of a justice of the peace, which even in the hands of a man of honour is highly formidable, will be prostituted to mean and scandalous purposes...and from these ill consequences we may collect the prudent foresight of our ancient lawgivers who suffered neither the property nor punishment of the subject to be

> determined by the opinion of any one or two men; and we may also observe the necessity of not deviating any further from our ancient constitution...

(emphasis supplied) 4 BLACKSTONE, COMMENTARIES * 277-9. Additionally, summary proceedings were most often used to "...inflict divers petty pecuniary mulcts and corporal punishment...for many disorderly offenses; such as common swearing, drunkenness, vagrancy, idleness..." 4 BLACKSTONE, COMMENTARIES * 278. Precedent which allowed a magistrate to order an offender whipped for vagrancy, swearing or drunkenness is rather disreputable, and is not persuasive precedent to support a modern denial of jury trial.

Finally, the codification argument is flawed because it ignores the fact that the Sixth Amendment does clearly depart from colonial practice and gives greater protections than were available under colonial practice and even under common law. For example, under the common law, the accused was not entitled to compulsory process for the production of witnesses. T. Lynch, *Rethinking the Petty Offense Doctrine*, 4 KAN. J. LAW PUB. POL'Y 14 (Fall 1994). The Sixth Amendment clearly makes compulsory process a required constitutional right explicitly departing from common law and colonial practice. U.S. Const. amend. VI. The codification argument would render the Constitution a nullity, as any provision that differed from the common law or colonial practice would be eliminated despite the plain language of the Constitution. The codification argument fails because a constitutional interpretation that eliminates the right it is meant to elucidate cannot be maintained. The relentless logic of Justice Black's dissent in *Baldwin* cannot be overcome.

IV. *Conclusion*

Part of the rationale of *Blanton* appears to have been a hope that a six month penalty standard would be simpler to apply than the inherent nature test. *Blanton*, 489 U.S. 541-2. Instead this Court is faced with the difficulties presented by the aggregation problem and in addition, it appears that this

Court will be faced with numerous cases raising claims of "serious" collateral consequences, e.g., *U.S. v. Nachtigal*, 113 S.Ct. 1072 (1993), due to the wide variety of non-imprisonment penalties. It has not proven difficult to approximate the standards imposed by the plain language of the Constitution to Sixth Amendment rights other than jury trial. See *Argersinger v. Hamlin*, 407 U.S. 25 (1972). As noted earlier a majority of jurisdiction provide for jury trial for petty criminal offenses, "In fact, of the ten most populous cities in the United States, seven are currently operating under a rule that gives the right to a jury trial in any case where imprisonment is a *possible* penalty."(emphasis supplied) T. Lynch, *Rethinking the Petty Offense Doctrine*, 4 KAN. J. LAW PUB. POL'Y 14 (Fall 1994). Certainly it is difficult to accept a radical change in precedent that has the effect of reducing such a vital constitutional right.

Amicus curiae would urge this Court to re-examine the petty offense exception. To paraphrase Justice Scalia, for good or for bad, the Sixth Amendment requires jury trial, "...and we are not at liberty to ignore it. To quote the document one last time (for it plainly says all that need be said): 'in *all* criminal prosecutions; the accused shall enjoy the right [to a speedy and public trial by jury].'" *Maryland v. Craig*, 497 U.S. 836, 870 (1990) (Scalia, J., dissenting). Rather than viewing jury trial as an impediment to the smooth functioning of justice, *amicus curiae* urges this Court to restore the jury to its proper function as the pre-eminent guarantor of due process in the American judicial system for "all crimes" and "in all criminal prosecutions".

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

RAY LEWIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE AMERICAN CIVIL LIBERTIES UNION, AND DISTRICT OF COLUMBIA *AMICI*, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI[1]

Amici are three national membership organizations, and three organizations that provide legal representation to indigent persons accused of crime in the District of Columbia, all of which share an interest in the preservation of the right to jury trial.

The National Legal Aid and Defender Association (NLADA). NLADA is a nationwide non-profit organization, dedicated to the provision of quality legal services in criminal and civil cases to persons financially unable to obtain counsel. Its membership includes most public defender offices around the country, as well as many assigned defense counsel.

The National Association of Criminal Defense Lawyers (NACDL). NACDL is a nationwide, non-profit voluntary association of criminal defense lawyers founded in 1958 with a membership of more than 8,700 attorneys. The NACDL is affiliated with 68 state and local criminal defense organization with which it works cooperatively on issues related to criminal law and procedure, and thus, it speaks for more than 28,000 criminal defense lawyers nationwide.

The American Civil Liberties Union (ACLU). The ACLU is a non-profit, non-partisan organization with nearly 300,000 members nationwide. The ACLU is dedicated to the preservation of individual rights and to the participation of citizens in governance. Both are implicated in this case.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

The District of Columbia *Amici*. The Public Defender Service for the District of Columbia (PDS) was established by Congress in 1970 to provide representation to indigent criminal defendants in the local and federal courts of the District of Columbia. Students in the Georgetown University Law Center Criminal Justice Clinic (GULC-CJC) have provided representation to defendants in misdemeanor cases in the District of Columbia Superior Court since 1972. Students in the George Washington University Law School Appellate Clinic (GW-AC) represent indigent clients in appeals from criminal convictions before the District of Columbia Court of Appeals.

PDS, GULC-CJC, and GW-AC, together with the American Civil Liberties Union of the National Capital Area, the local affiliate of the ACLU, participated as *amici curiae* in *Burgess v. United States*, No. 95-1352, a case currently pending before the District of Columbia Court of Appeals sitting *en banc* that involves the same issue presented by the Petition for Writ of Certiorari in this case. *Burgess* did not raise the second issue before this Court, because the trial judge made no sentencing promises before trial, and because the United States acknowledged that such a promise would have no effect on a defendant's right to jury trial under the Constitution.

SUMMARY OF THE ARGUMENT

Petitioner Lewis was tried for two counts of obstructing the United States mail, offenses for which Congress authorized an aggregate term of imprisonment of one year, the same penalty authorized for the offense of assault charged in *Baldwin v. New York*, 399 U.S. 66 (1970). Lewis was entitled to a jury trial for the same reason as Baldwin: the authorized penalty for the charges he faced in a single proceeding exceeded "that allowable for a petty

criminal offense." *Codispoti v. Pennsylvania*, 418 U.S. 506, 516 (1974). The only distinction between this case and *Baldwin* is that the prosecution in *Baldwin* involved a single count, and this case involves two. This distinction cannot make a constitutional difference. When tried together, the two offenses charged here for obstructing the mail on two consecutive days are no different in their seriousness from a single continuing offense carrying a one year penalty for the same conduct. The right to jury trial applies to this prosecution, just as it would to the continuing offense.

The Court has relied on a simple, bright-line standard to distinguish petty offenses from "crimes" requiring a jury trial. "[N]o offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized." *Baldwin*, 399 U.S. at 69. As the Court recognized in *Codispoti*, when several offenses are tried together and their authorized penalties exceed six months' imprisonment, these offenses are "equivalent to a serious offense." 418 U.S. at 517. The penalty authorized by the legislature plays an important role in deciding whether society deems an offense serious in nature, *Blanton v. City of North Las Vegas*, 489 U.S. 538, 541 (1989), but it also plays an independent role in delimiting the petty offense exception. This Court has never before exempted a prosecution in which the authorized penalties "'puncture the 6-month incarceration line,'" *id.* at 543 (quoting Brief for Petitioner at 16), from the ambit of Article III and the Sixth Amendment and it should not do so now. The six month dividing line serves the dual purposes of the jury trial clauses; "to prevent oppression by the Government," *Duncan*, 391 U.S. at 155, and to secure "[t]he opportunity for ordinary citizens to participate in the administration of justice." *Powers v. Ohio*, 499 U.S. 400, 406 (1991). A crime is no less serious, from the perspective of the prisoner ordered to serve the sentence, or that of the community

asked to accept the legitimacy of the punishment, because it is charged in two counts tried together rather than one count with the same penalty.

Nor is an otherwise serious criminal prosecution made petty by a judicial officer's promise to impose a sentence of six months' imprisonment or less. This Court has already held it is the sentence authorized by the legislature (or the court, for criminal contempts), not the actual sentence imposed, that determines the right to jury trial. *Duncan v. Louisiana*, 391 U.S. 145, 159-60 (1968). The only difference between a promised sentence and an actual sentence of less than six months is that the accused has no fear of a greater penalty at the beginning of the trial. But the jury trial clauses were not included in the Constitution to relieve anxiety; rather, they provide a bulwark of ordinary citizens against the power of the government, including the judiciary, in all criminal prosecutions.

Also, no principle could confine the effect of a judge's sentencing promise to cases like this one, where the basis for the right to jury trial is the aggregate penalty for several counts. Giving effect to such a promise would allow a judge to deny a jury trial for any crime, regardless of the authorized penalty, so long as the judge was willing to trade a lighter sentence for the administrative ease of a bench trial. But the legislative branch must strike this balance — subject to the six month limit — not a busy trial judge. Allowing sentencing promises to determine the right to jury trial would also pose serious practical problems, because a judge can neither exercise informed discretion without gathering information about the offense and the offender, nor gather such information without tainting the trial.

ARGUMENT

THE CONSTITUTION CONFERS A RIGHT TO JURY TRIAL IN ANY PROSECUTION FOR WHICH THE AUTHORIZED PENALTY EXCEEDS SIX MONTHS' IMPRISONMENT.

This Court has determined that "[t]he possibility of a sentence exceeding six months . . . is 'sufficiently severe by itself' to require the opportunity for a jury trial." *Blanton v. City of North Las Vegas*, 489 U.S. 538, 542 (1989) (quoting *Baldwin v. New York*, 399 U.S. 66, 69 n.6 (1970)). The question here is how that rule should be applied to a prosecution in which the aggregate penalty authorized for all counts exceeds six months, but the penalty authorized for each count alone is six months or less. To achieve its purpose, the *Baldwin* rule must apply to the entire prosecution. That is how the Court applied *Baldwin* to a single prosecution for seven counts of criminal contempt in *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974). The text of the Constitution requires this result, because it confers a right to jury trial for "all crimes," and in "all criminal prosecutions," rather than for individual counts in a prosecution. Moreover, any application of the jury trial clauses must respect the "profound judgment," *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968), that decisions about life and liberty — in all but truly petty matters — were entrusted to juries as a check on the power of government.

A. The Court Has Adopted a Bright Line Rule that Treats an Authorized Penalty of More than Six Months' Imprisonment — for One Count or Several — as Serious.

Article III and the Sixth Amendment secure the right to jury trial for "*all* crimes" and "*all* criminal prosecutions." Because English common law exempted petty offenses from the right to jury trial, however, this Court has read such an exception into the constitutional text. *Duncan*, 391 U.S. at 159. To distinguish petty offenses from crimes triable by jury this Court has drawn a bright line in *Baldwin v. New York*, 399 U.S. 66 (1970), *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974), and *Blanton v. City of North Las Vegas*, 489 U.S. 538 (1989), based on the authorized penalty: "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized." *Baldwin*, 399 U.S. at 69 (footnote omitted). This standard is easy to apply, whether to one offense or to several. In *Codispoti*, the Court overturned judgments for criminal contempt for which the trial judge imposed consecutive sentences totaling more than six months, "a ruling which necessarily extended the prison term to be served *beyond that allowable for a petty criminal offense*." 418 U.S. at 516 (emphasis added).[2] When the penalties authorized by the legislature for offenses tried together in a single proceeding exceed six months, they go "beyond that allowable for a petty criminal offense," and the defendant is entitled to a jury trial.

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[2] "In criminal contempt prosecutions, 'where no maximum penalty is authorized, the severity of the penalty actually imposed is the best indication of the seriousness of the particular offense,'" *Blanton*, 489 U.S. at 542 n.6 (quoting *Frank v. United States*, 395 U.S. 147, 149 (1969)), whereas the penalty authorized by the legislature controls here.

Criminal conduct does not come neatly pre-packaged as "offenses." The authorized consequences of each criminal prosecution are determined by a combination of legislative action — the definitions of offenses and their maximum sentences — and executive action — the decision to select charges and to join them for prosecution. The Constitution's criminal jury trial provisions would provide little protection against arbitrary power to the accused and little right of participation to the citizen if a prosecutor's charging decision conclusively determined the right to jury trial regardless of the penalty authorized for the entire proceeding.

Legislatures have a great deal of leeway in defining crimes and specifying their penalties. For example, Petitioner Lewis was charged with two counts of obstructing the mail, in violation of 18 U.S.C. § 1701, with each count relating to conduct on a different day. *United States v. Lewis*, 65 F.3d 252, 253 (2d Cir. 1995). But Lewis was observed opening (and obstructing) several pieces of mail on June 3; depending upon the unit of prosecution chosen by the legislature, each act could have constituted a separate offense, subject to a separate penalty.[3] On the other hand,

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[3] *See Bell v. United States*, 349 U.S. 81 (1955) (transportation of several women across state lines for immoral purposes was single violation of the Mann Act); *United States v. Cooper*, 966 F.2d 936, 943 n.11 (5th Cir.), *cert. denied*, 506 U.S. 980 (1992) (unit of prosecution for making building available as a crack house, 21 U.S.C. § 856(a)(2)); *United States v. Wall*, 37 F.3d 1443, 1445 (10th Cir. 1994) (bank fraud, 18 U.S.C. § 1344(2)); *United States v. Esch*, 832 F.2d 531, 541 (10th Cir. 1987), *cert. denied*, 485 U.S. 908 (1988) (use of a minor to create sexually explicit visual images, 18 U.S.C. § 2251(a)); *United States v. Pollen*, 978 F.2d 78, 85 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 2332 (1993) (tax evasion, 26 U.S.C. § 7201); *United States v. Davenport*, 929 F.2d 1169, 1172 (7th Cir. 1991), *cert. denied*, 502 U.S. 1031 (1992) (structuring currency transactions, 31 U.S.C. § 5324(3)); *United States*

(continued...)

some crimes are defined as "continuing offenses" that may include conduct over the course of several days, weeks, or years, *see Brown v. Ohio*, 432 U.S. 161, 169-70 (1977), so that Lewis' crime on both days could just as easily have been defined as a single offense. Moreover, this Court's decision in *Missouri v. Hunter*, 459 U.S. 359, 368-69 (1983), determined that even when two statutes include the same elements, "[w]here . . . a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under *Blockburger*, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial." For this reason, the legislature has the authority to subdivide any prohibited criminal conduct into overlapping offenses for which consecutive sentences could be imposed. A prosecutor may choose to join any number of such offenses in a single prosecution under Fed. R. Crim. P. 8. A jury trial right that depends only on the penalty specified for a count in an information, and allows unlimited penalties to be imposed for the same conduct in a single non-jury trial, provides no defense against government oppression.

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[3](...continued)
v. Langford, 946 F.2d 798 (11th Cir. 1991), *cert. denied*, 503 U.S. 960 (1992) (use of mail to commit securities fraud, 15 U.S.C. § 78j(b)); *United States v. Song*, 934 F.2d 105, 108-9 (7th Cir. 1991) (trademark offense, 18 U.S.C. § 2320); *United States v. Ravel*, 930 F.2d 721, 724 (9th Cir.), *cert. denied*, 502 U.S. 911 (1991) (possession of stolen merchandise, 18 U.S.C. § 659); *Jackson v. United States*, 926 F.2d 763 (8th Cir.), *cert. denied*, 502 U.S. 967 (1991) (possession of unregistered firearms, 26 U.S.C. § 5861).

1. The Court Has Already Resolved the Issue Presented Here in *Codispoti*.

The only decision by this Court to have applied the Sixth Amendment to a joint trial of several counts, each carrying a maximum penalty of six months' imprisonment or less, is *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974), where the Court overturned criminal contempt judgments because the aggregate penalty imposed as a result of a single proceeding exceeded six months. Following the decision in *Codispoti*, every federal court to consider the issue, until the decision below in *Lewis*, concluded that a jury was required for a single trial on several individually petty offenses if the aggregate penalty was greater than six months.[4] In addition, two state supreme courts that had previously concluded no jury trial was required when each offense was punishable by less than six months reversed themselves after *Codispoti*.[5] The common defect in the recent decisions concluding that

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[4] *Lewis*, 65 F.3d at 254 (collecting cases). The Second Circuit omitted the decision in *United States v. Semple*, 661 F. Supp. 556, 557 (D.D.C. 1987), from its list, but we think this was appropriate because the district judge in *Semple* based his decision on what he erroneously believed to be binding precedent from the local District of Columbia courts.

[5] *State v. McCarroll*, 337 So. 2d 475, 480 (La. 1976) (overruling *City of Monroe v. Wilhite*, 233 So. 2d 535 (La.), *cert. denied*, 400 U.S. 910 (1970)); *State v. Sanchez*, 786 P.2d 42 (N.M. 1990) (overruling *State v. James*, 415 P.2d 543 (N.M. 1966)). An unpublished intermediate appellate court decision in *State v. Goering*, No. A-93-1128, 1994 Neb. App. LEXIS 309 (Neb. App. Oct. 25, 1994), *cert. denied*, 115 S. Ct. 1963 (1995), is the only post-*Codispoti* state case of which we are aware that has upheld convictions in a multiple count prosecution for which an aggregate sentence of more than six months' imprisonment was authorized. *Goering* relied on the actual, rather than the authorized sentence, contrary to the teaching of *Duncan*, 391 U.S. at 159-60.

a jury trial is not required when the authorized aggregate penalty exceeds six months' imprisonment is that they either ignore *Codispoti* entirely, or mistakenly deem it irrelevant. *See Lewis*, 65 F.3d at 255; *United States v. Brown*, 71 F.3d 845 (11th Cir. 1996); *see also United States v. Coppins*, 953 F.2d 86, 91-92 (4th Cir. 1991) (Niemeyer, J., dissenting).[6] Properly understood, *Codispoti* resolves the issue now before the Court.

Codispoti was sentenced to fourteen years in prison for seven separate criminal contempts committed on separate days of a criminal trial in which Codispoti served as his own counsel. The Court vacated these summary contempt judgments, remanding for trial before a different judge. 418 U.S. at 507 (citing *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971)). On remand, Codispoti requested a jury trial, which was denied. After reviewing the transcripts of the 1966 trial, the new judge found Codispoti guilty as charged, and sentenced him to six months in prison for each of six counts, and to a term of three months for the remaining count, with each sentence to run consecutively. *Id.* at 509.

The Court began its analysis by describing "a fixed dividing line between petty and serious offenses: those crimes carrying a sentence of more than six months are

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[6] Judge Niemeyer did not cite *Codispoti* at all in his *Coppins* dissent and neither did the Eleventh Circuit in *Brown*. Neither party cited *Codispoti* in their briefs to the Second Circuit below, although both sides cited cases discussing *Codispoti*. The *Lewis* court concluded that "[w]hile *Codispoti* controls in those circumstances in which no maximum penalty is provided by law, it does not affect the analysis when Congress has provided a specific measure of the seriousness of a particular crime -- then, as now, aggregation of penalties remains an inappropriate basis upon which to determine a defendant's right to a jury trial." 65 F.3d at 255.

serious crimes and those carrying a sentence of six months or less are petty crimes." *Id.* at 512. Explaining the issue before the Court, Justice White acknowledged that, "[o]ur cases, . . . do not expressly address petitioners' remaining argument that they were entitled to jury trials because the prison sentences imposed after post trial convictions for contemptuous acts during trial were to be served consecutively and, although each was no more than six months, aggregated more than six months in jail." *Id.* at 512-13. Pennsylvania argued "that petitioners' contempts were separate offenses and that, because no more than a six months' sentence was imposed for any single offense, each contempt was necessarily a petty offense triable without a jury." *Id.* at 517.

The Court rejected the state's argument that it should look at each count separately, rather than apply the "fixed dividing line" to the prosecution as a whole:

> Here the contempts against each petitioner were tried seriatim in one proceeding, and the trial judge not only imposed a separate sentence for each contempt but also determined that the individual sentences were to run consecutively rather than concurrently, a ruling which necessarily extended the prison term to be served beyond that allowable for a petty criminal offense. *As a result of this single proceeding*, Codispoti was sentenced to three years and three months for his seven contemptuous acts, Langnes [a co-defendant] to two years and eight months for his six contempts. In terms of the sentence imposed, which was obviously several times more than six months, each

> contemnor was tried for what was *equivalent to a serious offense and was entitled to a jury trial.*

Id. at 516-17 (emphasis added). Although the Court divided over the disposition of the case,[7] no Justice registered disagreement with the proposition that the aggregate sentence, rather than the sentence for each count, was dispositive of the jury trial claim.

2. *Codispoti* Is Not Limited to Contempts.

Notwithstanding the clear import of *Codispoti*, the court below insisted that "aggregation of penalties remains an inappropriate basis upon which to determine a defendant's right to a jury trial." 65 F.3d at 255. The *Lewis* court thought it was not bound by *Codispoti*, because it was a contempt case. However, *Codispoti* cannot be meaningfully distinguished from this case on the ground that it involved contempt charges. First, the Court in *Blanton* cited *Codispoti* along with *Baldwin* for the proposition that "[w]e held 'only that a potential sentence in excess of six months' imprisonment is sufficiently severe by itself to take the offense out of the category of []petty[].'" *Blanton*, 489 U.S. at 538 (quoting *Baldwin*, 399 U.S. at 69 n.6, and citing *Codispoti*, 418 U.S. at 506, 512 n.4) (emphasis deleted). The *Blanton* Court did not shy away from relying on *Codispoti* because it was a contempt case. Even more importantly, however, the *Codispoti* decision itself stated

[7] Justice Blackmun authored a dissent, joined by Chief Justice Burger, and Justices Stewart and Rehnquist, arguing that the right to jury trial was inapplicable to "direct" criminal contempts. 418 U.S. at 522-23. In a separate dissent, Justice Rehnquist argued that *Duncan* should not be applied, because Codispoti had first been convicted of the contempts in 1966. *Id.* at 533.

that: "criminal contempt is a crime in every fundamental respect. . . .'[I]n terms of those considerations which make the right to jury trial fundamental in criminal cases, *there is no substantial difference between serious contempts and other serious crimes.*'" *Codispoti*, 418 U.S. at 516 (emphasis added; citation omitted; alteration in original); *see also Taylor v. Hayes*, 418 U.S. 488, 495 (1974).[8]

This Court addressed the aggregation issue in *Codispoti* with the assumption that each separate contempt charge was

[8] The application of the Sixth Amendment to the states in *Duncan* coincided with an equally important development in the law of contempt. In *Bloom v. Illinois*, 391 U.S. 194 (1968), decided the same day as *Duncan*, the Court proclaimed that, "[c]riminal contempt is a crime in the ordinary sense," 391 U.S. at 201, to which the right to trial by jury applied. Illinois law provided no maximum sentence for contempt. Bloom had been sentenced to prison for two years, the same penalty authorized for Duncan's crime. "Under the rule in [*Cheff v. Schnackenberg*, 384 U.S. 373 (1966)], when the legislature has not expressed a judgment as to the seriousness of an offense by fixing a maximum penalty which may be imposed, we are to look at the penalty as the best evidence of the seriousness of the offense." *Id.* at 211. Relying on its determination in *Duncan* that an offense punishable by two years' imprisonment was not petty, the Court held that Bloom had been denied a right to a jury trial. Since *Duncan* and *Bloom*, the jury trial clauses have been applied to contempts in the same way they have been to statutory offenses. *See Frank v. United States*, 395 U.S. 147 (1969) (criminal contempt punished by a term of three years' probation is a petty offense); *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 219-220 (1968) (no right to jury trial for contempt where state law limited penalty to 10 days in jail and a $50 fine). *Bloom* and *Frank* show that -- except for the manner in which the authorized sentence is determined -- the jury trial right for criminal contempts and for statutory offenses is the same.

a petty offense, and concluded that these otherwise petty offenses aggregated together were "*equivalent to a serious offense*" for purposes of the jury trial right. 418 U.S. at 516 (emphasis added). The *only* difference between *Codispoti* and a non-contempt aggregation case is that in *Codispoti* the Pennsylvania trial court determined that the offenses were "petty," while for other crimes the legislature would have made this determination. But once such a determination has been made, the analysis of whether a jury trial is required is the same, and *Codispoti* therefore cannot be dismissed, as it was by the Second Circuit, because it involved contempt offenses.

The United States has argued elsewhere, however, that the decision in *Codispoti* was really based on the need to rein in potential abuses of the contempt power: "Thus understood, *Codispoti* merely deprives a trial judge of the power to avoid the constitutional requirement of jury trial by *post hoc* parsing of a single contempt into multiple charges."[9] It would, naturally, raise concerns if a judge intentionally manipulated contempt charges to circumvent the right to jury trial, but the opinion in *Codispoti* does not betray a hint that the Court suspected such an abuse. Indeed, the decision to treat Codispoti's conduct as seven separate contempts, rather than as a single crime, was made by the original trial judge in 1966, before this Court had even decided *Duncan* and *Bloom*.[10] The judge had no

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[9] Brief for Appellee before the En Banc Court at 35, *Burgess v. United States*, (D.C.) (No. 95-CM-1352).

[10] Moreover, the plurality would hardly have agreed that the trial judge could have levied the same penalties in separate summary contempt proceedings, if the objective had been to restrain the contempt power. *See* 418 U.S. at 513-15 (plurality). *But see* 418 U.S. at 519 (Marshall, J., concurring in part).

reason to structure the contempt charges to avoid constitutional rulings that had not been made. *See* 418 U.S. at 533 (Rehnquist, J., dissenting) (arguing that *Duncan* should not be applied because the original contempt judgments predated that decision). Rather than hinging the jury trial right on an unproductive inquiry into the charging official's subjective intentions, *Codispoti* sticks to the bright line rule. Furthermore, concerns about structuring prosecutions to avoid jury trials are not limited to criminal contempts. The same potential for evasion and abuse would exist if prosecutors were free to reassemble serious crimes as packages of petty offenses. Instead of a "fixed dividing line" related to our society's notion of what kinds of criminal punishments must bear the imprimatur of the community, we would have a purely arbitrary line that would depend entirely on prosecutorial discretion.

B. The Seriousness of the Penalty Is a Basis for Requiring a Jury Trial, Independent of the Nature of the Offense.

This Court has historically used both "the nature of the offense and the amount of punishment prescribed," to determine whether prosecution is "petty" rather than criminal. *Schick v. United States*, 195 U.S. 65, 68 (1904). Petty offenses are those that neither carry a serious penalty, nor are by their nature otherwise serious. The Court's reliance on penalty in recent years to determine the nature of the offense should not obscure the independent role that the potential loss of liberty has always played in the petty offense cases. Because the aggregate penalty here was serious, the nature of the individual counts does not affect Petitioner's right to a jury trial.

The jury trial provisions of Article III and the Sixth Amendment were intended to preserve the right to jury trial

as it existed under English common law. Although both the Sixth Amendment and Article III are by their terms absolute, "[i]t has long been settled that 'there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision.'" *Blanton*, 489 U.S. at 541 (quoting *Duncan*, 391 U.S. at 159)). The words of the Constitution — "all crimes" and "all criminal prosecutions" — "cannot be interpreted safely except by reference to the common law and British institutions as they were when the instrument was framed and adopted." Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 921 (1926) (quoting *Ex parte Grossman*, 267 U.S. 87, 108 (1925)). English justices of the peace exercised limited "summary jurisdiction" to try petty offenses without a jury, and this practice persisted in the colonies and then in the new United States, notwithstanding the adoption of state constitutional provisions guaranteeing the right to jury trial. "Broadly speaking, acts were dealt with summarily which did not offend too deeply the moral purposes of the community, which were not too close to society's danger, and were stigmatized by punishment relatively light." *Id.* at 980-81.[11]

In *Callan v. Wilson*, 127 U.S. 540, 549 (1888), the

[11] When an offense has a specific common law antecedent, however, the Court has held that the Constitution preserves the right to jury trial, regardless of the modern penalty. *District of Columbia v. Colts*, 282 U.S. 63 (1930) (reckless driving, punishable by a $25 fine and up to thirty days in jail, was jury-triable at common law). Although the Court has undoubtedly "moved away" from reliance on common law offenses, it has not overruled *Colts*, or other decisions using a common law test. *See Blanton*, 489 U.S. at 541 & n.5. We agree with Petitioner that obstruction of the mail was a serious offense at common law, and that he was entitled to a jury trial on that basis as well. Pet. Br. at 24-6.

Court's first petty offense case, the Court explained that the word "crime" in Article III, "embraces as well some classes of misdemeanors, the punishment of which involves or may involve the deprivation of the liberty of the citizen." In *Schick*, the Court upheld waivers of the right to jury trial, concluding that receiving unbranded oleomargarine was a petty offense. Responding to the claim that the offense was a crime because it was included in legislation providing elsewhere for substantial criminal penalties, Justice Brewer wrote: "The truth is, the nature of the offense and the amount of punishment prescribed rather than its place in the statutes determines whether it is to be classed among serious or petty offenses, whether among crimes or misdemeanors. Clearly both indicate that this particular violation of the statute is only a petty offense." 195 U.S. at 68.

In *District of Columbia v. Clawans*, 300 U.S. 617, 625 (1937), the Court accepted the defendant's concession that the offense of dealing in second hand property without a license was, by its nature, a petty offense. Nevertheless, the Court went on to consider whether the statutory penalty — a fine of $300 and imprisonment for up to 90 days — provided a basis for a jury trial. Agreeing that "the question is not free from doubt," *id.*, the Court examined the penalties for petty offenses under English and colonial law, and found it "impossible to say that a ninety day penalty for a petty offense, meted out upon a trial without a jury, does not conform to standards which prevailed when the Constitution was adopted." *Id.* at 626-27. Significantly, the Court presaged the adoption of the six month rule in *Baldwin*:

> But we may doubt whether summary trial with punishment of more than six months' imprisonment, prescribed by some pre-Revolutionary statutes, is admissible

> without concluding that a penalty of ninety days is too much. Doubts must be resolved, not subjectively by recourse of the judge to his own sympathy and emotions, but by objective standards such as may be observed in the laws and practices of the community taken as a gauge of its social and ethical judgments.

Id. at 627-28 (footnote omitted).

Duncan v. Louisiana held the right to jury trial applicable to the states through the Fourteenth Amendment. 391 U.S. at 156. Turning to Louisiana's contention that Duncan was not entitled to a jury trial in any event, because he was sentenced to only sixty days in a parish prison, the Court restated the rule for federal offenses: "Crimes carrying possible penalties up to six months do not require a jury trial if they otherwise qualify as petty offenses. But *the penalty authorized* for a particular crime is of major relevance in determining whether it is serious or not and *may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment.*" *Id.* at 159 (citations omitted; emphasis added).

The Court relied on "objective criteria, chiefly the existing laws and practices in the Nation," to decide whether the maximum penalty for battery — imprisonment for up to two years and a fine — required a jury trial. *Id.* at 161. The Court noted that "in the late 18th century in America crimes triable without a jury were for the most part punishable by no more than a six-month prison term, although there appear to have been exceptions to this rule." *Id.* Current state practice also supported a six-month rule. In a footnote, the Court observed that "there appear to be only two instances, aside from the Louisiana scheme, in

which a State denies jury trial for a crime punishable by imprisonment for longer than six months." *Id.* at 161 n.33. The Court declined, however, to "settle in this case the exact location of the line between petty offenses and serious crimes," *id.* at 161, finding it sufficient to hold that a crime punishable by two years imprisonment was not a petty offense, *id.* at 161-62.

Finally, in *Baldwin v. New York*, 399 U.S. 66 (1970), the Court "concluded that no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized." *Id.* at 69 (plurality opinion).[12] The Court recognized that previous decisions had considered the nature of the offense as well as the authorized penalty. *Id. at 69* n.6. The Court found it unnecessary to consider the nature of the offense in *Baldwin*, however, deciding "only that a potential sentence in excess of six months' imprisonment is sufficiently severe by itself to take the offense out of the category of 'petty.'" *Id.* The Court drew the line at six months on the basis of a "near-uniform judgment" that a jury trial is required "when what is at stake is the deprivation of individual liberty for a period exceeding six months." *Id.* at 72. Because Baldwin faced a maximum authorized sentence of one year, the same sentence authorized for Petitioner Lewis' two offenses, the Court reversed his conviction.

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[12] Justice White authored the opinion of the Court, joined by Justices Brennan and Marshall. Justices Black and Douglas concurred in the judgment, reiterating their view that any offense punishable by imprisonment merits a jury trial under the Constitution. 399 U.S. at 74-75. Chief Justice Burger, and Justices Stewart and Harlan wrote separate dissents. *id.* at 76; 117; and 143. Because the plurality's ruling is narrower than the view articulated in the concurring opinion, it constitutes the holding of this Court. *See Marks v. United States*, 430 U.S. 188, 193 (1977).

In *Blanton v. City of North Las Vegas*, 489 U.S. 538 (1989), the Court moved closer to a rule distinguishing petty offenses from crimes solely by reference to penalty. Although the Court did not overrule its "early decisions focus[ing] on the nature of the offense and on whether it was triable by a jury at common law," *id.* at 541, the decision in *Blanton* adopted a presumption that society views an offense punishable by six months' imprisonment or less as petty. *Id.* at 543.[13]

The Court justified its "decision to move away from inquiries into such matters as the nature of the offense," and to rely instead on the objective measure of the authorized penalty, in part on "the substantial number of statutory offenses lacking common-law antecedents," *id.* at 541 n.5. *Blanton* makes clear, however, that once the "6-month incarceration line" is crossed, the inquiry into seriousness comes to an end. The views of society about the seriousness of an offense expressed through the legislature matter only when the penalty itself does not "'puncture the 6-month incarceration line.'" 489 U.S. at 543.

Nevertheless, *Blanton* has been misinterpreted as authority for disregarding the aggregate penalty in a multiple

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[13] A defendant is entitled to a jury trial in such circumstances only if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense is a "serious" one. This standard, albeit somewhat imprecise, should ensure the availability of a jury trial in the rare situation where a legislature packs an offense it deems "serious" with onerous penalties that nonetheless "do not puncture the 6-month incarceration line."

Id. (citation and footnote omitted).

count prosecution. *See Brown*, 71 F.3d at 847; *Lewis*, 65 F.3d at 254. In his dissent in *Coppins*, Judge Niemeyer wrote:

> The fact remains that the defendant is charged with separate, petty offenses, each constituting a crime for which the defendant would not be entitled to a jury trial. The meaningful constitutional object of inquiry is the *offense* with which the defendant is charged, not the accumulation of offenses tried on a given day or on a given charging document. Judicial efficiency imposed at no greater risk to the defendant should not change the standard for determining whether the defendant is given a jury trial. This is the case where multiple zeros still add up to zero.

953 F.2d at 92. Neither this reasoning, nor this arithmetic, adds up. As this Court recognized in *Codispoti*, "the accumulation of offenses tried on a given day" does matter. The aggregate penalty authorized for a single proceeding *is* an object of constitutional inquiry, even if the legislature has deemed each count to be a petty offense. Moreover, the penalties for "petty offenses" are not "zeroes" that sum to zero, but periods of incarceration that when strung together as they were in *Codispoti*, are "equivalent to a serious offense."

Contrary to Judge Niemeyer and to the Second Circuit below, a plurality of the *Codispoti* court saw an important difference between a single trial with an aggregate penalty greater than six months' imprisonment and a series of summary contempt trials, each punishable by six months or less, "even if the total punishment meted out" exceeded six

months. 418 U.S. at 515.[14] Justice Marshall, later the author of *Blanton*, thought a jury trial should be available, even for separate summary proceedings.[15] Like Justice White's opinion, Justice Marshall's concurrence stressed "that a six month sentence is the constitutional dividing line between serious offenses for which trial by jury must be afforded and petty offenses, and that in contempt cases it is the sentence actually imposed rather than the penalty authorized by law which is determinative." *Id.* at 519.

Blanton did not entrust the Sixth Amendment to the legislature; rather, it adopted an objective bright-line judicial standard that defers to the legislature's judgment about the seriousness of a given offense, provided the accused is not

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[14] We think the court below was wrong in suggesting that the fact that prosecutors could avoid jury trials by charging petty offenses separately has any bearing on how to apply the jury trial clauses to a single joint prosecution. *See Lewis*, 65 F.3d at 255. Prosecutors have substantial incentives to join related offenses for trial, *see United States v. Dixon*, 113 S. Ct. 2849, 2863 n.15 (1993), whether or not this means a defendant is entitled to jury trial, so that continuing to require jury trials in multiple count prosecutions will not create new administrative burdens for the courts, even in those two Circuits that have recently adopted a contrary rule. In addition, prosecutors will remain free to pursue single count prosecutions for petty offenses in cases in which they conclude the advantages of a bench trial justify seeking only a petty sentence. What prosecutors cannot do — as they did here — is to have it both ways, seeking serious penalties in a non-jury proceeding.

[15] Although *amici* share Justice Marshall's concerns about potential abuse of the summary contempt power, we think these are better addressed under the rubric of the Due Process Clause. *Cf. United Mine Workers v. Bagwell*, 114 S. Ct. 2552 (1994). In addition, the summary proceedings must be truly separate. When sentencing for summary contempts committed in the same proceeding is deferred, the six month limitation applies to the aggregate penalty for all counts. *Taylor v. Hayes*, 418 U.S. 488, 495-96 (1974).

threatened with the loss of more than six months of liberty.[16] A "fixed dividing line" based upon objective criteria cannot be oblivious to the real world difference between a trial on a single count with a maximum authorized sentence of six months, and a trial on several counts, with no limit on the authorized punishment.

C. The Right to Jury Trial Is Not Only an Individual Right of the Defendant; the Jury Trial Clauses Protect the Legitimacy of the Criminal Law by Assuring the Community's Participation in the Determination of Guilt or Innocence When Serious Penalties Are at Stake.

The proponent of an exception to the right to jury trial, has a heavy burden of justification not only because of the inclusive language of the constitutional text, but also because the jury plays a central role in our constitutional framework. "Jury trial was a valued right of persons accused of crime, and it was also an allocation of political power to the citizenry." Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 876 (1994). De Tocqueville described the American jury as "a political institution . . . one form of the sovereignty of the people." 1 DEMOCRACY IN AMERICA 335 (Reeves trans., J.S. Mill ed., 1961). It was,

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[16] The court below relied on 18 U.S.C. § 3584(a) as evidence of a legislative determination "that multiple offenses prosecuted jointly are no more serious in their aggregate than the most serious single offense of conviction." 65 F.3d at 255. This statute, does not, however, place any limits on the power of the court to impose consecutive sentences, and does not, therefore, actually limit the authorized penalty for multiple counts when tried together. Rather, section 3584(a) establishes a rule of construction when a sentencing judge fails to specify whether sentences are imposed consecutively or concurrently.

a "school . . . in which each juror learns his rights." *Id.* at 337.

> The opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system. In *Balzac v. Porto Rico*, Chief Justice Taft wrote for the Court:
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> > "The jury system postulates a conscious duty of participation in the machinery of justice . . . . One of its greatest benefits is in the security it gives the people that they, as jurors actual or possible, being part of the judicial system of the country can prevent its arbitrary use or abuse."

Powers v. Ohio, 499 U.S. 400, 406 (1991) (quoting *Balzac v. Porto Rico*, 258 U.S. 298, 310 (1922); alteration in original; other citations omitted). Indeed, it is this right and duty "of participation in the machinery of justice," in addition to the right of the individual, that underlies this Court's steadfast refusal to tolerate discrimination in jury selection. *See, e.g., Allen v. Hardy*, 478 U.S. 255, 259 (1986) (per curiam); *Powers*, 499 U.S. at 406; *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1428 n.14 (1994).

"The framers' enthusiastic support for the jury stemmed in large measure from the role that juries had played in resisting English authority before the Revolution." Alschuler & Deiss, 61 U. CHI. L. REV. at 871. One of the complaints registered against the King in the Declaration of Independence was that he had deprived the colonists "of the

benefits of trial by jury." As a result of their colonial experience, the authors of Article III and the Sixth Amendment came to view the participation of citizens in the judicial process through jury service as a vital safeguard against government oppression. "[J]ury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power — a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence." *Duncan,* 391 U.S. at 156. From the perspective of the community asked to accept the legitimacy of criminal punishment, as from the perspective of the prisoner required to serve the sentence, there is no difference between a sentence imposed in a single prosecution for one count or for several counts.

The inclusion of the right to jury trial in Article III reflects its structural importance because the original Constitution largely took for granted the preservation of individual rights. "The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Duncan*, 391 U.S. at 156. In Federalist 83, Hamilton responded to those objecting to the proposed Constitution because it did not expressly provide for the right to jury trial in civil cases.[17] Hamilton recognized that concerns over the silence of the Constitution with respect to

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[17] THE FEDERALIST PAPERS 495-510 (Clinton Rossiter ed., 1961)

civil cases had spilled over to criminal cases, and he took pains to reassure his readers that legislative authority over the mode of trial, "in regard to criminal causes, is abridged by the express injunction of trial by jury in all such cases." *Id.* at 496-97. Despite these assurances, concerns about preserving the right to jury trial were strong enough that a number of States called for the inclusion of a right to jury trial in criminal cases in the Bill of Rights, to which Congress ultimately acceded by proposing the jury trial clause of the Sixth Amendment. *See* Frankfurter & Corcoran, 39 HARV. L. REV. at 968-75; *Singer v. United States*, 380 U.S. 24, 31 (1965).

"The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered." *Duncan*, 391 U.S. at 155. As the Court has recently observed, the abridgment of the jury's role in a criminal case is a structural defect, "without which a criminal trial cannot reliably serve its function." *Sullivan v. Louisiana*, 508 U.S. 275, ___, 113 S. Ct. 2078, 2083 (1993). The constitutional rights to jury trial secure a degree of citizen participation in governance as well as provide a safeguard for the accused. "Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process." *Powers*, 499 U.S. at 407. These reciprocal rights provide a constitutional foundation for the legitimacy of criminal sanctions in our society, because for all but "petty offenses" the precondition for criminal punishment is the "common-sense judgment of a jury," *Duncan*, 391 U.S. at 155, about guilt or innocence. This "ensures continued acceptance of the laws by all of the people." *Powers*, 499 U.S. at 407 (citing *Green v. United States*, 356 U.S. 165, 215 (1958) (Black, J., dissenting)). The fixed dividing line assures the participation of the community in all decisions affecting

more than six months of liberty. It would, truly, raise form over substance if — by charging several counts rather than one — prosecutors could seek serious criminal penalties without presenting their case to a jury.

D. A Trial Judge Cannot Deprive the Accused of the Right to a Jury Trial by Promising to Impose a Sentence No Greater Than Six Months' Imprisonment.

The Second Circuit below properly declined to rely on the magistrate judge's promise not to sentence Lewis to more than six months in prison as a reason for upholding his convictions in a bench trial. 65 F.3d at 255.[18] The right to jury trial is a check on the powers of the judiciary, as well as the executive and legislative branches. *Duncan*, 391 U.S. at 156. The subjective decision of an individual trial judge — who may be preoccupied with the management of a lengthy docket — that a particular case does not require a sentence of more than six months cannot nullify the legislature's determination that the penalty authorized for the prosecution exceeds "that allowable for a petty criminal offense." *Codispoti*, 418 U.S. at 516. If, as this Court held in *Blanton*, 489 U.S. at 541-42, "[t]he judiciary should not substitute its judgment as to seriousness for that of the legislature," about an entire category of offenses, certainly a single trial judge should not be allowed to do so about a single case. Allowing a judge to avoid holding a jury trial by promising before trial to limit the sentence would substitute that judge's view of the seriousness of the case for

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[18] The U.S. Attorney for the District of Columbia argued that such promises would have no effect on the right to jury trial in *Burgess*. No transcript of the *Burgess* argument is available, however the government previously made the same point in its Brief for Respondent at 37-38, *Foster v. Canan*, 661 A.2d 676 (D.C. 1995).

the legislature's judgment expressed by the maximum authorized penalties for the offenses.

This Court has already decided that it is the authorized penalty for an offense, rather than the actual sentence imposed after trial (except for criminal contempts, where the sentence imposed is the authorized sentence) that determines the right to jury trial. *Duncan*, 391 U.S. at 159-60. The only difference between a pretrial promise to limit the sentence to less than six months and an actual sentence of less than six months after trial is that the defendant would have no subjective fear of a more serious punishment. But the six month line between petty offenses and crimes is not concerned so much with reducing the defendant's subjective apprehension of a long sentence, as it is with identifying those prosecutions that must be submitted to the community because of their authorized penalty. If individual trial judges had the power to deny jury trials whenever they were willing to promise a sentence of less than six months' imprisonment, they could do so even in a felony case.[19]

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[19] The issue here is fundamentally different from the question before the Court in *Scott v. Illinois*, 440 U.S. 367 (1979), because the purpose of the jury trial clauses is not to enhance the reliability of verdicts in criminal trials. This Court in *Duncan* acknowledged the continuing debate, "as to the wisdom of permitting untrained layman to determine the facts in civil and criminal proceedings." 391 U.S. at 156-57. But the basis of the jury trial right was not that juries were better at finding facts than judges, so much as that they might sometimes find them differently. "If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it." *Id.* at 156. The Court drew comfort from a recent study that concluded "when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed. *Id.* at 157 (citing HARRY KALVEN, JR. (continued...)

Finally, there is a serious practical objection to basing the right to jury trial on pretrial promises. Trial judges in federal cases are statutorily obligated to base their sentences on the characteristics of the offense and of the offender. *See* 18 U.S.C. § 3553 (a) ("The court, in determining the particular sentence to be imposed, shall consider [among other factors] — (1) the nature and circumstances of the offense and the history and characteristics of the defendant"). The same is generally true of state courts as well. Judges cannot make sentencing decisions before trial without information about the defendant and the offense, and they cannot gather the necessary information before trial because of its enormous potential to prejudicially taint the determination of guilt or innocence. To limit the sentence pre-trial, a judge would have to make a subjective determination of "what the case is worth" before any witnesses are presented.[20]

Sentences are not bargaining chips for a judge to use to expedite court calendars when an accused is entitled to, and has declined to waive, a jury trial. A judge's promise may not be as important to the defendant as the right to jury trial in any given instance.[21] Certainly, it is not a bargain that

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[19](...continued)
& HANS ZEISEL, THE AMERICAN JURY (1966)). Additionally, as we discuss in part D, *supra*, the rights of the accused are not the only rights at stake. The citizenry has an interest in participating in the determination of guilt or innocence in any prosecution for which the legislature has authorized serious penalties, regardless of the judge's pre- or post-trial sentencing decision.

[20] *Cf. Scott*, 440 U.S. at 374 (Powell, J., concurring).

[21] There is an important practical difference as well between the decision in *Scott* to promise to impose no jail time, and the finer distinction of whether to impose more or less than six months' imprisonment.

should be forced on the defendant in derogation of the "most priceless" of our safeguards of individual liberty. *Irvin* v. *Dowd*, 366 U.S. 717, 721 (1961).

CONCLUSION

The judgments of conviction should be reversed, and the case remanded for a trial by jury.

Respectfully submitted,

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